stimuli that brings the competition between these two industries within §7's competition-preserving proscriptions". 378 U.S. at 455.

In *Federal Trade Commission v. Consolidated Foods,* 380 U.S. 592 (1965), the Court found that reciprocal trading as a result of an acquisition violates §7 if there is a probability of a lessening of competition.

In *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966), the Court found a violation of §7 when two powerful companies, although each having a small share in the market, merge in a market exhibiting a marked trend toward concentration.

In *United States v. Pabst Brewery Co.,* 384 U.S. 546 (1966), the Court held that proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial §7 issue, which is whether the merger may substantially lessen competition anywhere in the country.

In *United States v. Grinnell Corp.,* 384 U.S. 563 (1966), it was held that there is no barrier to combining in a single market a number of different products or services where the combination reflects commercial realities.

Finally, in *Federal Trade Commission v. Procter & Gamble Co.,* 386 U.S. 568 (1967), the Court held that any merger, whether it is horizontal, vertical, conglomerate or product-extension, must be tested by the same standard of §7, that is, whether it may substantially lessen competition.

The Industry.

Daily newspapers are classified into three classes or types: (1) community or local, (2) metropolitan and (3) regional.

A local newspaper serves its own community. It emphasizes local news, local issues and advertising. Although each community daily likes to think of itself as a primary newspaper, basically it will have a skeleton of national and international news from press associations which vary little from paper to paper. Such newspapers are newspapers of record for their communities reporting births, deaths, marriages, social events and the like.

The uncontradicted evidence was surprising in regard to the power of the press. It was testified by Dr. Walter Wilcox, a professor in journalism at the University of California at Los Angeles and the defendant's expert witness on newspapers, that:

> "the newspaper, is, in fact, a captive of its community . . .; the newspaper must exist in the image of its community and it cannot in any significant degree change itself and depart from the requirements and needs of its community."

Dr. Wilcox notes that two newspapers published in the same community tend to be the same. Each newspaper will devote a certain amount of space to obituaries, to churches, to service clubs, etc. and will normally choose about the same package of national and international news. He described local newspapers as considering themselves to be primary newspapers, but in reality they are not. A primary newspaper is one which gives to its reader all the news and information he needs to be an informed person. Dr. Wilcox described local newspapers as not meeting that aspiration. He further explained in regard to national and international news there will not be any significant variation from one local newspaper to another.

Metropolitan newspapers serve a metropolitan complex which is an area of population concentration that has in it a number of communities. They put emphasis on the development in detail of national, international, regional and state news. Papers such as the Washington Post, the New York Times and the Los Angeles Times have handled this interpretive journalism through the widespread system of bureaus, developing the stories in depth and then explaining why events occur. They seek out the news that is of interest to the greatest number of readers rather than attempt to do a systematic job of covering the news of all the small communities within the metropolitan complex. However, as in the case of the Los Angeles Times, there has been a recent trend of establishing zone editions which feature local news, social news and advertising of the communities within the particular zone in order to increase circulation and advertising in the smaller communities.

A regional newspaper serves a vast region in a systematic way. Such a paper is usually found in areas that are to some degree still rural in character. It carries local news of its major community and, extensively and systematically, local news of the smaller communities in the region. Such papers are the Sacramento Bee, which serves Northern and Central California; the Salt Lake Tribune, which serves all of Utah and part of Idaho, Wyoming and Nevada; and the Des Moines Morning Register, which covers all of Iowa and part of Nebraska and South Dakota, bypassing larger communites like Iowa City and Cedar Rapids.

The Product Market.

In actions under §7 of the Clayton Act, a finding of the appropriate "product market" is a necessary predicate to a determination of whether a merger has the requisite anticompetitive effects. In *Brown Shoe Co. v. United States, supra,* it is set forth:

> "Thus, as we have previously noted, '[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition". Substantially can be determined only in terms of the market affected.'
>
> "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." 370 U.S. at 324.

The thrust of the defense to this action is that "there can be no appropriate product market which includes both the Times and the Sun because there is no cross-elasticity of demand between the two newspapers, and because they are not regarded as substitutes for one another for any of the services furnished by a newspaper".

In *Brown Shoe, supra,* in setting a guideline for the appropriate product market, the Court said:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." 370 U.S. at 325.

It is this sentence upon which the defendant bases its position. Its expert economic witness states that "If the price of one of the products goes up, . . . —and the other stays the same—one expects demand, if they are close substitutes, to be transferred from the commodity which is relatively high to the one which is relatively low." The defendant has pointed out that differences between the price raises of the Times and the Sun did not produce a significant change in circulation. However, as the Supreme Court pointed out in *United States v. Continental Can Co., supra,* since demand is not particularly or immediately responsive to price changes, demand is not determinative of the product market issue under §7 of the Clayton Act.

Furthermore, the defendant claims that the Times and the Sun are two distinct and different types of newspapers which do not compete with and are not substitutes for each other. It is contended that (1) they carry a different package insofar as local news is concerned; the Sun acts as a newspaper of record for its circulation area, whereas the Times has a horizontal coverage; (2) the Sun is locally oriented toward its community; it carries everything of significance that might happen in its immediate area; (3) the Times emphasizes departmentalization and specialization of the news; the Sun has no such approach; (4) the number, quality and extent of the Times' features could not be duplicated by the other newspapers in the area where it circulates because they are smaller and do not have the financial resources to do so; and (5) the outlying newspapers' foreign and national coverage tends to be straight wire service copy, with some supplementary news service, whereas the Times uses its own staff.

The reliance of the defendant upon the "reasonable interchangeability of use or the cross-elasticity of demand" test of *Brown Shoe* is unfounded. The balance of the paragraph in which the sentence is contained must be read in order to understand the rational tests which must govern whether there has been a §7 violation. The entire paragraph is as follows:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because §7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." 370 U.S. at 325.

As stated in *United States v. Continental Can Co., supra:*

> "Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, in fact, competition exists.'" 378 U.S. at 453.

In *Brown Shoe* itself, it was stated that one of the purposes of the 1950 amendment to §7 was to make it apply not only to mergers between actual competitors but also to verticle and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country. 370 U.S. at 317. In *Federal Trade Commission v. Procter & Gamble Co., supra,* there was no hesitancy in applying §7 even though the products could not in any degree be considered as substitutes for each other. There, the products of the acquired company were only complementary to those of the acquiring company, yet the Court held that since the effect of the merger would be to lessen competition, the test of §7 was met.

The argument that the Times and the Sun did not compete with each other and for that reason there could not be an antitrust violation has lost all its validity since the 1950 amendment. The fact that two merging companies presently compete or do not compete is not the significant issue. Congress has directed that the courts must look to the effect and impact of the merger. If its effect is anticompetitive, then there is a violation. As stated in *United States v. Von's Grocery Co., supra:*

> "As we said in *Brown Shoe Co. v. United States,* 370 U.S. 294, 315, 'The dominant theme pervading

congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.' To arrest this 'rising tide' toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers. It both revitalized §7 of the Clayton Act by 'plugging its loophole' and *broadened its scope so as not only to prohibit mergers between competitors, the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly' but to prohibit all mergers having that effect.* (Emphasis supplied.) By using these terms in §7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers." 384 U.S. at 276-77.

It makes little difference when one newspaper acquires another what the merger is called, whether it be horizontal or product-extension. The issue is whether the effect is to substantially lessen competition in any section of the country. To claim that a reader will or will not buy a newspaper or shift his readership to another newspaper which is available to him is not the

significant test under §7. To characterize or not to characterize one newspaper as a substitute for the other is to lose sight of the intent of Congress as plainly set forth in *Brown Shoe* and the subsequent Supreme Court cases which have cut across all contentions except the anticompetitive effect of the merger.

The daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product. It has sufficient peculiar characteristics and uses which make it distinguishable from all other products. *Cf. United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). A daily newspaper is a newspaper of general readership published at least five times a week. Daily newspapers have a unique market for which there is no real substitute. They have achieved industry and public recognition and utilize unique methods of production, distribution and pricing, all practical indicia for determining a product market.

The daily newspaper provides a cluster of services in one unique package. It provides readers with a daily written record of current events and reference information including vital statistics, public announcements, legal notices, box scores, stock market reports, weather reports, theater listings and radio and television logs. They provide more, wider and deeper coverage of all news—international, national and local—than any other medium of daily news dissemination. They offer a combination of syndicated features, such as comics, columnists and cartoons, not carried by any other medium. They provide readers with current advertising in greater depth and detail than any other medium. There are some classes of advertisers, such as grocery and de-

partment stores, which must rely upon daily newspapers for almost all their advertising.

The daily newspaper business has its own trade associations and societies, such as the American Newspaper Publishers Association and the American Society of Newspaper Editors, the membership of which is confined to publishers and editors of daily newspapers. It has its own trade journals, such as Editor and Publisher, in which statistics and records relating only to that business are reported. It has separate and distinct methods for reporting the readership coverage of various newspapers, as for example, ABC Audit Reports, Circulation '64, and SRDS Newspaper Circulation Analysis.

Within the daily newspaper market, there are three submarkets: the morning newspaper, the evening newspaper and the Sunday newspaper. The industry publishers, Editors and Publishers, Associated Press Bylaws and Media Scope all recognize the morning newspaper as a separate category within the daily newspaper business. In addition, the newspaper circulation reporting services (Audit Bureau of Circulations, Standard Rate & Data Service and American Newspaper Markets) all report circulations separately for morning and evening newspapers.

Because morning dailies go to press during the night, they are distributed at a time when traffic on the streets is lighter and can therefore be circulated over a wider geographic area than can evening newspapers, and in a much shorter time. By reason of the fact that morning newspapers have approximately the same deadlines and because they are all offered for sale and distributed in the morning hours, morning newspapers

tend to compete more vigorously for circulation with each other than they do with evening papers.

Little need be said as to why the Sunday newspaper is a submarket. Any reader recognizes the difference in price, style and content with special Sunday features and supplements. The newspaper industry by its publications recognizes the separate category.

In the final analysis, the daily newspaper business is a commercial reality which is universally recognized as a line of commerce. The following from *Crown Zellerbach Corp. v. Federal Trade Commission,* 296 F. 2d 800 (9th Cir. 1961), *cert. denied,* 370 U.S. 937 (1962), is appropriate:

> "[A]s a practical matter no one in the industry or interested in it or having anything to do with it has any difficulty in distinguishing [it]. . . ." 296 F.2d at 813.

In some of the services which they provide, daily newspapers compete with other media, such as radio and television, both for news and advertising. This does not mean, however, that all competitors of any service provided by a daily newspaper must be lumped into the same line of commerce with it. Although "[f]or every product, substitutes exist. . . . a relevant market cannot meaningfully encompass that infinite range." *United States v. Continental Can Co.,* 378 U.S. at 449.

The defendant argues that each daily newspaper is so unique as to occupy a product market of its own. This argument stems more from pride of publication than from commercial reality. The contention is made that if a reader in Southern California wants depth in international, national and regional news, he buys the

Times and if he wants depth in the local news of his own community, he buys his small local paper. In effect, it is claimed that the Times and the surrounding local daily newspapers are complementary toward each other. As set forth previously, the concept of two products being complementary toward each other is not a barrier to §7 if the effect of the merger may have anti-competitive effects. *Federal Trade Commission v. Procter & Gamble Co., supra.*

It is now firmly established that products need not be identical to be included in a §7 analysis of the product market. Furthermore, in *Union Leader Corp. v. Newspapers of New England, Inc.,* 180 F.Supp. 125 (D.C. Mass.), *modified,* 284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833, the court of appeals recognized that numerous papers published all over New England could comprise a relevant daily newspaper market for both Clayton and Sherman Act purposes.

Finally, when a merger such as here results in a share of from 10.6% to 54.8% of total weekday circulation, from 23.9% to 99.5% of total morning circulation and from 20.3% to 64.3% of total Sunday circulation in the relevant geographic market, the acquisition constitutes a prima facie violation of the Clayton Act. As set forth in *United States v. Continental Can Co., supra:*

> "Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of §7's design to prevent undue concentration." 378 U.S. at 458.

Competition for Advertising.

The Times competed with the Sun for advertising. The largest share of the revenue of a daily newspaper comes from its advertisements, and advertising is its lifeblood.

The Sun, before its acquisition by the Times, recognized that the Los Angeles metropolitan newspapers were their major competitors for national advertising. For many years prior to the merger, The Sun Company and its counterpart in adjoining Riverside County, the Riverside-Press Enterprise, recognized that many advertisers thought their ads in the Los Angeles metropolitan papers adequately covered the San Bernardino-Riverside area and engaged in a joint national advertising campaign in order to dispel this idea. Ads were placed in industry advertising media to convince advertisers that if they wished to reach the San Bernardino-Riverside area they should place their ads in the Sun and Press-Enterprise rather than in the Los Angeles metropolitan papers.

Likewise, the Times considered the Sun a competitor for advertising. The Times engaged in promotional advertising of its own to convince advertisers that ads placed in the Los Angeles Times are "a better buy than a carefully selected group of Southern California dailies", which group included the Sun papers and the Riverside-Press Enterprise.

In summary, prior to the merger both the acquiring and the merging companies recognized each other as their competitor for advertising. After the acquisition, the advertising campaign that both papers waged against each other ceased.

The Geographic Market.

It is necessary after defining the product market to determine the geographic market (the "section of the country") in order to determine the anticompetitive effect of the merger. *Brown Shoe Co. v. United States,* 370 U.S. at 324.

In 1964, the year of the acquisition, the Times had a weekday daily circulation of 16,650 and a Sunday circulation of 31,993 within San Bernardino County. This amounted to 10.6% of the total weekday circulation for both morning and evening newspapers, 23.9% of total morning circulation and 20.3% of the total Sunday circulation.

The Sun had its entire circulation, except for a very few copies, within the limits of San Bernardino County. The county therefore encompasses virtually the entire area of circulation and home delivery overlap between the Times and the Sun.

Both the Sun and Times Mirror companies have for years recognized San Bernardino County as a daily newspaper market, and have regularly reported for advertisers' use such things as circulation, number of households, population and retail sales on a San Bernardino County basis. In 1964 the Times requested the Audit Bureau of Circulations to include all of San Bernardino County in its retail trading zone, thus recognizing the county as part of its market.

Newspapers and advertising industries such as Audit Bureau of Circulations, American Newspapers Market, Inc. and Standard Rate & Data Service recognize San Bernardino County as a newspaper market.

The Times Mirror Company, in evaluating the acquisition of the Sun, used the daily newspaper business in San Bernardino County as the relevant market area. It recognized San Bernardino County as the basic area of circulation overlap between the Times and the Sun. It treated the county as a daily newspaper market and determined the market share of the Times and Sun by computing their "percentage of field" against total daily newspaper circulation in San Bernardino County.

The defendant contends that the County of San Bernardino is not commercially realistic because county boundaries to not define the boundaries of a newspaper market. It claims that counties are political and administrative boundaries, not necessarily market boundaries. This contention may be true as a generalized statement. In each case the geographic market must be determined with sufficient precision to weigh the anti-competitive effects of the merger. The Times claims that the largest part of its circulation was in the west part of San Bernardino County, while the largest part of the circulation of the Sun was in the east part. However, as stated previously, the newspaper industry has recognized San Bernardino County as a daily newspaper market. Most important of all, the Times itself, in evaluating the acquisition, used the daily newspaper business in the entire San Bernardino County as the relevant market.

The defendant claims that by reason of the fact that until the level of 80% to 85% of circulation of both newspapers is reached, there is no geographical overlap between them and that, therefore, San Bernardino County is not a proper geographic market. It is claimed the rule of *Philadelphia Nat'l Bank, supra,* is

that only the first 75% of a company's business should be considered in determining whether there is any competitive overlap. That is not the holding. The problem in *Philadelphia Nat'l Bank* was not to determine whether the business of the acquired or acquiring bank overlapped, since it was clear that they did, but to arrive at a particular delineation of their area of overlap. The Court held that a recognized four-county area which accounted for a substantial majority of the business of the two banks was a practical and proper market. The figure of 75% was cited to show that the relevant market encompassed most of the area of overlap, not that there must be an area of overlap before the 75% figure was reached.

In any event, San Bernardino County is a recognized market which encompasses not just 75% but almost all of the circulation overlap between the two newspapers.

The argument of defendant that the geographical overlap must occur before the two companies did 75% of their business is also contrary to a teaching found in *Brown Shoe v. United States, supra.* There, the following illustration was given:

> "If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected." 370 U.S. at 337 n. 65.

The government in seeking a broad injunction asks not only must San Bernardino County be considered the

relevant geographic market, but all of Southern California be such a market even though the Sun has a circulation of only an insignificant few papers outside San Bernardino County. Heavy reliance is placed on *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y. 1958), where the court stated:

> "Even in a case where two companies operate primarily in separate areas, a merger can have an adverse effect on competition in that the enhanced strength of the merged company may give it such an undue advantage in each area that competition may be substantially lessened." 168 F. Supp. at 600.

The answer here is there was no evidence of the effect the merger would have in Santa Barbara, Ventura, Orange, San Diego or the other counties in Southern California with the exception of San Bernardino. The fact is the Times before the merger was so large and strong that its enhanced strength as the result of the merger was not significantly greater any place outside of San Bernardino County with the possible exception of Riverside County. The acquisition of Acme Colorprint Company may provide the anticompetitive effect in the entire Southern California market, but this was not stressed at the trial.

There was no demonstration that the purchase of the Sun by someone other than the Times could have any effect upon the daily newspaper business outside San Bernardino County. It would be stretching the doctrine of judicial knowledge beyond its breaking point for the court to find that if the Pulitzers had purchased the Sun, they could have created competition for the Times beyond San Bernardino County. They might have, but

the record does not reveal it. The "entry into the field" concept is one of vital importance, particularly since *Federal Trade Commission v. Procter & Gamble Co., supra,* but to make the concept applicable in a particular case it must be supported by evidence.

Concentration in the Industry.

In *United States v. Pabst Brewing Co., supra,* the Court stated that "a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be". 384 U.S. at 552-53. Similarly, in *United States v. Philadelphia Nat'l Bank, supra,* the Court held: "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." 374 U.S. at 365 n. 42. Finally, in *United States v. Von's Grocery Co., supra,* neither the acquiring nor the acquired company had a dominant share of the market. Concentration of ownership was relatively low. Nevertheless, the Court found the acquisition to be violative of §7 because there was a trend toward the decline of independent competitors in the industry and there was a trend toward acquisition in the industry. The Court, in *United States v. Continental Can Co., supra,* recognized the effects of a merger thusly:

> "A merger . . . is significant not only for its intrinsic effect on competition but also for its tendency to endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages . . . ." 378 U.S. at 464.

In determining the extent of concentration in the industry, inquiry is not limited to the relevant geographic market. In *United States v. Philadelphia Nat'l Bank, supra,* the Court determined that the section of the country which was relevant there was the metropolitan area consisting of Philadelphia and its three contiguous counties. Yet in discussing the trend toward concentration in the commercial banking business (the product market), the Court extensively discussed the trend throughout the United States, an area far outside the relevant geographic market. 374 U.S. at 325-26. It is therefore proper here to discuss the trend of concentration not only in the relevant market of San Bernardino County but at least also in the larger area of Southern California where the Los Angeles Times circulates.

At the time of the acquisition, there was already a heavy concentration of daily newspaper ownership in the ten counties of Southern California. Four publishers (Times, Hearst, Copley and Ridder) accounted for 71% of all weekday daily newspaper circulation, and ten publishers accounted for almost 85% of such circulation. Three (Times, Copley and Ridder) accounted for over 85% of all morning daily newspapers circulation and two (Times and Hearst) accounted for about 66% of all Sunday circulation.

In the five-county area of Los Angeles County and its immediate surrounding counties, the top four publishers (Times, Hearst, Ridder and Freedom) accounted for 73% of all weekday daily circulation, while the top ten publishers accounted for 89% of the total. In this

five-county area, the Los Angeles Times alone accounted for 80% of all morning daily circulation in 1964; the top four morning publishers accounted for over 96% of such circulation, while the top four Sunday newspaper publishers accounted for 86% of all Sunday circulation.

There has been a steady decline of independent ownership of newspapers in Southern California. A newspaper is independently owned when its owners do not publish another newspaper at another locality. In San Bernardino County as of January 1, 1952, six of the seven daily newspapers were independently owned. On December 31, 1966, only three of the eight dailies published there remained independent.

In the Greater Los Angeles five-county market (Los Angeles and four surrounding counties) from January 1, 1952, through December 31, 1966, while the number of daily newspapers increased from 52 to 64, the number of independent dailies decreased from 33 to 14. In 1952, 63% of all daily newspapers in this five-county area were independent; in 1966, only 22% were independent.

In the ten-county area of Southern California in the same period of time, the number of daily newspapers increased from 66 to 82, but the number independently owned decreased from 39 to 20. In 1952, 59% of Southern California dailies were independent; in 1966 only 24% were independent.

The acquisition of the Sun by the Times was particularly anticompetitive because it eliminated one of the few independent papers which had been able to operate successfully in the morning and Sunday fields. Traditionally, most newspapers in Southern California have

been evening papers, one reason being the strength of the Los Angeles Times' circulation throughout Southern California. In 1965, only 8 of the 36 newspaper publishers in Southern California had morning papers, and of these only the Riverside Press-Enterprise was still independently owned. The morning field was dominated by the Times, which accounted for 70% of Southern California's morning circulation.

In San Bernardino County, as the result of the acquisition, Times Mirror's share of the 1964 market increased from 10.6% to 54.8% of total weekday daily circulation, from 23.9% to 99.5% of morning circulation and from 20.3% to 64.3% of Sunday circulation. In *United States v. Philadelphia Nat'l Bank, supra*, the Court stated: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." 374 U.S. at 364.

In San Bernardino County the following events have taken place since the acquisition:

1. On March 31, 1965, the Richardson Newspapers, publishers of the Pomona Progress Bulletin, purchased the Ontario-Upland Report.

2. On October 1, 1965, the Colton Courier ceased daily publication.

3. On April 1, 1966, the Rialto Record-News quit the daily newspaper field.

4. On May 8, 1967, the Lake Union Publishing Company, partially owned by the Scripps League, acquired the Fontana Herald-News, theretofore an independent daily. The Fontana and Ontario-Upland newspapers were the next two largest independent dailies after the Sun.

The acquisition has raised a barrier to entry of newspapers in the San Bernardino County market that is almost impossible to overcome. The evidence discloses the market has now been closed tight and no publisher will risk the expense of unilaterally starting a new daily newspaper there.

An acquisition which enhances existing barriers to entry in the market or increases the difficulties of smaller firms already in the market is particularly anticompetitive. In *Federal Trade Commission v. Procter & Gamble Co., supra,* one of the two major grounds on which the Court condemned the acquisition was "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing." 386 U.S. at 578.

The difficulty of entry any place within the Southern California daily newspaper market is illustrated best by the recent failure of one of the most powerful publishers in the United States, the New York Times, to successfully establish a West Coast edition.

Domination Over the Acquired Company.

The evidence clearly establishes that the defendant has taken active control of The Sun Company and has exercised control in such areas as the selection of top management, the editorial content and the advertising policy of the paper.

Within two months of the acquisition, the old Board of Directors of The Sun Company was supplanted by a new Board on which officers and executives of The Times Mirror Company constituted a majority. The

positions of Secretary, Treasurer and Assistant Secretary-Treasurer were filled by executives of the defendant. Six months later James A. Guthrie was replaced as president of The Sun Company by Otis Chandler, publisher of the Times.

After the acquisition, the Sun stopped its joint advertising campaign with the Riverside Press-Enterprise against the Los Angeles metropolitan papers. This change occurred as the result of suggestions from executives of the Times.

There is a legal presumption that when one corporation achieves control of another, there is an elimination of competition between them. *United States v. Pennzoil Co.*, 252 F. Supp. 962, 984 (W.D. Pa. 1965); *cf. United States v. Continental Can Co.*, 378 U.S. at 463; *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. at 605-07.

Conclusion.

The acquisition by The Times Mirror Company of The Sun Company on June 25, 1964, resulted in a violation of §7 of the Clayton Act. It is an acquisition by one corporation (The Times Mirror Company) of all the stock of another corporation (The Sun Company), both corporations being engaged in interstate commerce, whereby in the daily newspaper business (the relevant product market) in San Bernardino County, California (the relevant geographic market), the effect is to substantially lessen competition.

Form of Relief.

The government seeks an order of divestiture and an injunction prohibiting the defendant from acquiring any other daily newspaper in the relevant geographic market.

Divestiture has become the normal form of relief when acquisitions have been found to violate §7 of the Clayton Act. As stated in *United States v. E. I. du Pont de Nemours & Co., supra:*

> "It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate §7. The statute is specific and 'narrowly directed,' *Standard Oil Co. v. United States,* 337 U.S. 293, 312 (1949), and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce. The very words of §7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when §7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved." 366 U.S. 316, 328-30 (1961).

Complete divestiture here is the practical solution to correct the §7 violation.

However, the request for a perpetual injunction must be denied. The enthusiasm with which the government seeks this relief is recognized particularly as against such a dominant company in the newspaper business as The Times Mirror Company. However, the teaching of *Brown Shoe* must be remembered. In speaking of the history of §7 and the intent of Congress, the Court set forth:

> "[A]t the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress rec-

> ognized the stimulate to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. . . . Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." 370 U.S. at 319-20.

While it is recognized that injunctive relief has been granted in antitrust cases, the court is not able to predict the future of the daily newspaper business in San Bernardino County. For example, on May 1, 1967, the Victorville Daily Press, a weekly, became a daily and the government admits "it is a bit early to predict what its fate will be". In the event that it should become a failing paper and the defendant acquired it, a study must be made of the effect of the acquisition. It may be anticompetitive, or it may come within the congressional exemption as expressed in *Brown Shoe*. Based upon the evidence before it, the court cannot prejudge the newspaper business with sufficient certainty to grant the injunction. The dangers that could result from it outweigh any possible advantage that it may have.

Findings of Fact and Conclusions of Law:

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

Judgment.

It is the judgment of this court and the same is directed to be prepared separately and entered under Rule 58 of the Federal Rules of Civil Procedure as follows:

IT IS ADJUDGED AND DECREED—

1. That the acquisition and ownership of stock of The Sun Company by the Defendant, The Times Mirror Company, is in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

2. That the defendant is directed to divest itself of the stock of The Sun Company and shall not thereafter in any form or manner acquire any interest in or control over The Sun Company.

3. That the defendant shall within 60 days from the date this judgment becomes final lodge with the court a plan for divestiture which shall provide for the continuation of The Sun Company as a strong and viable company.

4. That divestiture shall be in accordance with such orders as the court directs.

5. That the court shall retain jurisdiction over the parties with reference to the action to make such further orders as may be proper to carry out the judgment.

6. That the plaintiff shall recover its costs of this action.

Dated this 11th day of October, 1967.

/s/ WARREN J. FERGUSON
Warren J. Ferguson
United States District Judge

Findings of Fact and Conclusions of Law.

In the United States District Court, for the District of Arizona.

United States of America, Plaintiff, vs. Citizen Publishing Company, Star Publishing Company, Tucson Newspapers Incorporated, Arden Publishing Company, and William A. Small, Jr., Defendants. No. Civ-1969 Tucson.

FINDINGS OF FACT

* * * *

THE "MARKET" ISSUES

A. *The Product Market*

60. The business of publishing a daily newspaper of general circulation includes three operations: the gathering and dissemination of news and information, the sale of space in the newspaper to advertisers, and the sale of the newspaper to its readers. These three operations are interdependent and inseparable; success of any one of them depends upon the success of the other two.

61. The business and commercial functions of a newspaper are performed by the advertising, circulation, production and business departments. The advertising department sells advertising space to local merchants and national advertisers. It prepares advertising copy which is dispatched to the production department; there the copy is set in type by the composing room; in the stereotype room the type is transformed into curved metal plates which are fitted to a rotary press which prints the newspaper at great speed. The printed paper is delivered by conveyor to the circulation de-

partment, which prepares the papers for distribution by trucks, newsboys, dealers, and mail. The circulation department is responsible for selling and distributing the newspaper.

62. The business department of the newspaper receives the revenues derived from the sale of advertising space and the sale of the newspaper. It also administers the details common to most businesses such as labor relations, credit, accounting functions, employee health and welfare programs, plant maintenance, and payroll and personnel records.

63. The function of the news and editorial department is to write editorials and gather and prepare news stories and features of interest to the public. This material is composed in type form and printed in much the same manner as advertising copy.

64. A high-quality metropolitan newspaper is one which reports full and accurate coverage of international, national, state, and local news and publishes responsible editorials and other material of service to its readers. Star and Citizen are both high-quality metropolitan daily newspapers of general circulation and do contain, among other things, complete and accurate coverage of local, state, national, and international news; editorials; society news; stock market tables; schedules of radio and television programs; home management news; church and religious news; comics; features; sports; local display; national display; classified and legal advertising. Star and Citizen each has extensive wire service facilities.

65. The quality of a newspaper is directly related to its cost and revenues. A properly financed newspaper can afford to employ a qualified staff of reporters, edi-

tors and assistant editors. There is keen competition among newspapers for such personnel. The quality of a newspaper may be improved by the extent to which it can afford to buy syndicated features and subscribe to news wire services.

66. Newspapers derive their revenue from the sale of advertising space and the sale of the newspaper itself, but the success of this, the commercial end of the business, depends on the success of the news and editorial operations; and successful news and editorial operations depend greatly upon the revenue derived from advertising and circulation.

67. The primary source of newspaper revenue is the sale of advertising space. Generally, circulation revenues amount only to between 22 and 28 percent of the total revenues of the newspaper and are not sufficient by themselves to support a successful newspaper operation.

68. The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will fur-

ther adversely affect the quality of the newspaper, resulting in a further decline in circulation.

69. The only daily printed media other than Star and Citizen published in Tucson are the Daily Reporter, a legal newspaper, and the Arizona Wildcat, the campus newspaper of the University of Arizona. Neither of these is comparable to the Star and Citizen.

70. The other daily newspapers of general circulation which are circulated in Tucson do not carry Tucson news and information of only local interest and, accordingly, are not substitutes for Star and Citizen.

71. There are no newspapers comparable to Star and Citizen issued and published in Tucson.

72. The production facilities of the Star and Citizen consist of a composing room, proof room, stereotype room and press room. These production facilities are unique in the Tucson area.

73. There are trade associations whose memberships are limited to the newspaper industry.

74. There are trade publications which are directed solely to the newspaper industry.

75. There are labor unions whose membership is limited to employees of the newspaper industry.

76. Regular membership in the Associated Press is limited to owners of newspapers.

77. The Bureau of the Budget has established a separate Standard Industrial Classification for newspaper publishing and collects and reports data separately for the newspaper publishing industry.

78. The broadcast media are subject to regulation by the Federal Communications Commission; there is no comparable regulation of newspapers.

79. There is industry and public recognition of the newspaper publishing business as a separate industry.

80. One of the prime functions of a daily newspaper of general circulation is to provide complete and accurate coverage of the news in the community which it serves.

81. Star and Citizen each have a large staff of reporters whose job it is to gather and report local news.

82. Star and Citizen are the only media serving the Tucson area that each day provide such things as local society news, schedules of current local events, reports of births and deaths, movie schedules, and box scores of local baseball games.

83. Daily newspapers, weekly newspapers, radio, television and magazines all supply to the public news and advertising content.

84. The only other media that are engaged in the dissemination of state, national, and international news, together with extensive coverage of Tucson happenings, on a daily basis in Tucson, are the Tucson radio and television stations.

85. The first television station commenced operating in Tucson in 1952. In 1965, there were three commercial television stations, all with network affiliations and one non-commercial television station operating in the Tucson area. A fourth commercial television station has been licensed by FCC to operate in the Tucson area.

86. In 1940, there were two commercial radio stations operating in the Tucson area. In 1965, there were ten English-speaking, one FM, and two Spanish-speaking radio stations in the Tucson area.

87. All of the television stations and many of the radio stations in operation in Tucson employ a staff of reporters who gather and report news; they also subscribe to UPI or AP broadcast wire services. In addition, the radio and television stations having network affiliations receive and broadcast news programs provided by the network wire services.

88. Radio and television stations broadcast at times during the day local, state, national and international news and sports.

89. Radio station KOLD, a CBS affiliate, carries a total of between seven to eight hours of news on an average broadcast day. Television station KVOA-TV, a NBC affiliate, carries a total of four hours of news on an average broadcast day. Of course, some of this news is repeated in succeeding newscasts through the day.

90. The largest staff of reporters on any of the television stations in Tucson consists of four.

91. The leading news radio station in Tucson has a staff of three reporters which it shares with its affiliated television station.

92. The radio and television stations in Tucson neither attempt to nor do they in fact report news in general with the same depth of coverage as do Star and Citizen.

93. The wire services received by the newspapers are different than those received by the radio and tele-

vision stations; the newspaper wire services report the news in greater detail.

94. A newspaper may be picked up and read at the convenience of the reader, whereas the news broadcast by radio or television stations can only be heard if the set is on at the particular time that the station is broadcasting it.

95. Newspapers constitute a permanent record of news and information; broadcast news is, by its nature, transitory.

96. The presentation of news is one of the primary objectives of television and because of the immediacy of news presentation by television, and its use of documentary films, video tape for on-the-spot coverage and news commentators, this medium presents greater news coverage and more detail on certain important events than provided by other media.

97. Radio and television stations present editorial opinions which many times conflict with editorials appearing in Star or Citizen.

98. Only about 10% of the non-advertising space in the Star and Citizen is devoted to entertainment.

99. With respect to the radio and television stations in Tucson the smallest percentage of non-advertising time devoted to entertainment in 1964 was 74% for television and 52% for radio.

100. Leaving advertising out of consideration, Star and Citizen are primarily media of news whereas radio

and television stations in Tucson are primarily media of entertainment.

101. Executives of radio and television stations in Tucson regularly read the newspapers for depth of coverage of the news.

102. Television and radio stations are able to broadcast on the scene coverage of news and sports events, a function which newspapers are unable to duplicate.

103. The United Press International issues different Stylebooks for its broadcast wires and its newspaper wires.

104. There are problems peculiar to writing for a broadcast medium that are significantly different from the problems connected with writing for a newspaper.

105. At least 82% of all the homes in the Tucson standard metropolitan area both subscribe to either Star or Citizen and have a radio set.

106. At least 78.8% of all the homes in the Tucson standard metropolitan area both subscribe to either Star or Citizen and have a television set.

107. The readers of Star and Citizen do not consider radio or television to be a substitute for these newspapers.

108. The weekly newspapers in Tucson do not attempt to and do not in fact cover the news to the same extent as Star and Citizen.

109. Defendants have advertised that "only the newspaper covers the news fully and in depth. There is no substitute for the daily newspaper.".

110. Defendants have advertised that "only the newspaper reader gets all the news."

111. With respect to the dissemination of news and information the Star and Citizen provide a unique service for which there are no available substitute products.

112. In addition to Star and Citizen, daily, weekly, and bimonthly newspapers, such as the Tucson American, a weekly delivered without charge, with a circulation over 88,000 in Pima County, the Arizona Republic, the Phoenix Gazette, the Sun News, Arizona Currents, Los Angeles Times, the New York Times, the Wall Street Journal and others are distributed within the Star-Citizen circulation area and disseminate to the public news and advertising matter. None of these newspapers provides the same coverage of news as do Star and Citizen. In 1964, the total circulation of out-of-town newspapers in the Tucson Standard Metropolitan Area was 3,379, as compared with Star and Citizen combined circulation of 73,799.

113. There have been periodic increases in both the subscription and newsstand prices of Star and Citizen during the period 1935 through 1964.

114. The minutes of meetings of the Board of Directors and executives of TNI which discuss circulation rates reflect no consideration of competing media as an obstacle to an increase in rates.

115. Star and Citizen have consistently increased circulation and circulation revenues despite the increases in both the subscription and newsstand prices of the papers.

116. The following table shows the net paid daily and combined daily circulations of Star and Citizen, in 1940 and in 1964, for the Tucson City Zone, the Tucson Standard Metropolitan Area, and total:

	1940	1964
Combined		
City Zone	16,214	71,850
Standard Met. Area	17,006	74,249
Total	23,295	85,634
Star		
City Zone	8,553	33,528
Standard Met. Area	9,060	35,205
Total	12,192	43,096
Citizen		
City Zone	7,661	38,322
Standard Met. Area	7,946	39,044
Total	11,103	42,538

117. Comparing the combined circulation of Star and Citizen with the occupied housing units in the Tucson Standard Metropolitan Area in the period 1940-1952, the circulation per housing unit in 1940 was .85 and in 1952 it was 1.00. The same comparison for the years 1953-1964 shows the circulation per housing unit as .98 in 1953 and .80 in 1964. In connection with these figures, it must be understood that in all of the years involved there were duplications in the circulation—that is, both papers were delivered at some houses—and that the percentage of duplications fell from 8% in 1946 to 4% in 1964. As to the Sunday Star, during the period 1954 to 1964 its circulation has increased in proportion to the increase in occupied housing units in the Tucson Standard Metropolitan Area.

118. During the period 1940-1964, the circulation revenues of Star and Citizen increased from approximately $122,000 to approximately $1,860,000.

119. The free distribution in Tucson since June, 1965, of 88,000 copies per week of the Tucson American, a weekly newspaper, has not affected the circulation of Star and Citizen.

120. Notwithstanding the introduction of television in Tucson in 1953 and its growth to three commercial stations by 1964, the circulation and the circulation revenues of Star and Citizen have increased steadily year after year.

121. As a result of the joint operation of Star and Citizen under the operating agreement, there has been no competition with respect to the circulations of these newspapers.

122. Because of the lack of competition Star and Citizen have not offered bargain subscription rates, have not engaged in significant promotion of their street sales, have not used promotional programs to sell subscriptions, and have been able to restrict the returns of newspapers from distributors.

123. Since at least 1950, Star and Citizen combined carrier promotion costs have been insignificant; in 1964, when net circulation revenues totalled $1,844,773, they amounted to $17,108. During the period 1950 through 1964, the annual carrier promotion costs of the newspapers, as a percentage of circulation revenue, decreased.

124. A great majority of the literate residents of Pima County feel and believe that the daily reading of the Star or Citizen, or both, is necessary in order to enable them to keep abreast of the news and to know

of the products and services being offered for sale in Pima County in which they may be interested. No appreciable part of these readers would discontinue their reading of Star and Citizen by reason of an increase in the circulation rates of the papers, unless such increase was inordinate or palpably unreasonable.

125. The defendants have power over price with respect to the circulation of their newspapers.

126. From 1952 to 1966 there has been a substantial increase in the number of advertising media available in the Tucson area.

127. The media which sell broadcast time or space used to deliver advertising material to the public in the Tucson area are daily newspapers, weekly newspapers, radio, television, magazines, billboards, handbills, direct mailers, and telephone directory yellow pages.

128. The principal source of defendants' revenue derives from the sale of advertising space in Star and Citizen; in 1964 revenue from this source amounted to approximately 75% of total revenues.

129. With but minor exceptions the advertising revenues and lineage of Star and Citizen have increased each year during the period 1941 through 1964; during this period net advertising revenues rose from about $400,000 to about $6,500,000, and advertising lineage rose from 720,167 inches to 3,511,282 inches.

130. During the period 1940 through 1964, Star and Citizen revenue per inch of advertising sold increased from $0.55 to $1.82.

131. There are four basic categories of advertising sold by the defendants: local display, national display, classified, and legal. Of these four categories, the most

significant both in terms of revenue and lineage is local display, which in 1964 accounted for $4,407,424 out of Star and Citizen's net advertising revenues of about $6,500,000, and for 2,430,248 out of a total of 3,511,282 inches of advertising space.

132. Star and Citizen are the only daily printed media of general circulation available to local Tucson advertisers.

133. Grocery stores and department stores in Tucson are the two largest advertisers in Star and Citizen. These department stores and most of these grocery stores have consistently concentrated their advertising in Star and Citizen, using other media primarily as a supplement to that advertising. Recently, some grocery stores in Tucson have used mailers, handbills, television, billboards, and radio; and some department stores have used radio, television, and circulars.

134. Besides Star and Citizen there are a number of weekly and bimonthly newspapers published in and around Tucson, such as the Tucson American, the Sun News, and the Arizona Currents, which sell advertising space in competition with TNI and the other advertising media.

135. The other printed media available to the local Tucson advertisers have limited and specialized coverage.

136. The end purpose of all commercial advertising is the distribution of sales information about a product or a service, and, in the case of a local merchant, to attract customers to his place of business.

137. The selection and use of advertising media depends upon the type of advertising job to be done and the type of audience to be reached.

138. Advertising agencies, advertisers, and representatives of the various advertising media in the Tucson area recognize that there is lively competition among all advertising media in the area.

139. TNI, broadcast media, and outdoor advertising companies in Tucson employ national representatives to solicit national advertising in competition with other media.

140. Standard Rate and Data periodically publishes a service available to advertisers and advertising agents which contains the national advertising rates of radio, television, magazines, and newspapers and is used by advertisers and advertising agencies to determine comparative cost of media throughout the United States. This service is used by Tucson advertising agencies in selecting media for national advertising, i.e., advertising not directed to the Tucson market.

141. The rates per unit of time for advertising on radio or television are not directly comparable with advertising rates per line or per inch in printed media. However, each of the major advertising media in the Tucson area measures the coverage of its respective medium in the cost per thousand persons reached and uses these costs, plus the distinctive features of its medium, to compete for the advertising dollar.

142. All major advertising media in the Tucson area are in active competition with each other. Advertisers and advertising agencies in selecting media give consideration to cost.

143. Salesmen from other media in soliciting advertising direct their sales efforts specifically against newspapers by emphasizing claims of lower cost and advertising advantages of their respective medium.

144. Advertising media are selected on the basis of the effectiveness of a particular medium and the results it produces and not on the basis of a comparison of prices.

145. The Bureau of Advertising, an adjunct of the American Association of Newspaper Representatives, assists newspaper representatives to compete against the other advertising media for the national advertising dollar.

146. The Institute of Outdoor Advertising supplies advertising and promotional materials to, and otherwise assists, outdoor advertising salesmen in Tucson and elsewhere to compete against newspapers and other media for local as well as national advertising.

147. The Television Advertising Bureau is a trade association which assists local television stations in Tucson and elsewhere to compete against newspapers and other media for local and national advertising expenditures and toward this end provides local television stations with sales and promotional materials to be used for soliciting advertising expenditures from newspaper advertisers.

148. Broadcast media salesmen compete with newspapers by claiming that a message carried in specific newspaper advertisements could be presented more effectively and at lower cost by radio or television.

149. The Radio Advertising Bureau (RAB) is most active in helping radio stations sell local and national advertising, and toward this end provides promotional materials aimed specifically against newspaper advertising. The Starch Report prepared by RAB has been used effectively by radio against newspapers in the sale of advertising in Tucson.

150. The Tucson Broadcasters Association is composed of members representing the radio and television business. Its purpose is to prepare sales presentations demonstrating to advertisers the advantages of advertising on radio or television rather than in newspapers.

151. There are production problems connected with television advertising that are not present with respect to newspaper advertising.

152. The maximum amount of consecutive commercial time that can be purchased on the Tucson radio or television stations is one minute; there is no comparable limitation in Star and Citizen.

153. It is not practical to advertise more than three items on a spot announcement on radio or television, while at least as many as fifty items can be advertised in a newspaper ad.

154. To the extent that advertisers desire a personalized approach in their advertising they are limited to the broadcast media and newspapers are not a feasible alternative.

155. Daily newspapers are the most satisfactory media for fulfilling the advertising needs of the firms merchandising large numbers of items at specific prices.

156. It is a common practice for advertisers to use other media, in addition to Star and Citizen, simultaneously.

157. Many advertisers use media in addition to the newspapers in order to reach an audience that they cannot reach by using newspapers alone, or to supplement their newspaper advertising.

158. There is a limited availability of desirable time spots on television; there is no comparable shortage in newspapers.

159. Radio and television pay commissions to advertising agencies on sales of local advertising but newspapers do not.

160. The circulation of newspapers is audited and accurate whereas radio and television audiences figures are only estimates.

161. Newspaper advertising rates are expressed in terms of space whereas television and radio rates are expressed in terms of time.

162. It is not feasible to compare the cost of advertising in newspapers with the cost of advertising in other media.

163. In setting their advertising rates, television and radio stations do not take into account the advertising rates of the Star and Citizen.

164. Star and Citizen offer advertisers substantially complete coverage which is not matched by any of the Tucson radio and television stations.

165. The quality and readership of a newspaper is a factor differentiating it from other advertising media. Advertising in a newspaper may be read and reread at the convenience of the reader, whereas the advertising broadcast by radio or television stations is transitory. Newspapers are significantly different from other advertising media.

166. Radio and television stations in Tucson advertise in Star and Citizen because their listeners go to the newspapers to obtain information about the stations' programming.

167. The sales methods and materials used by radio, television; magazines, billboards, yellow pages, mailers and other advertising media have succeeded in diverting some local and national advertising expenditures from the newspapers.

168. Advertisers do not quit newspaper advertising and go to other media because of rate increases by the newspapers. Representatives of radio, television, and other media say from experience that an increase in newspaper advertising rates causes a limited number of newspaper advertisers to initiate or expand the use of other media, but it does not appear that such new or expanded use is important to newspapers or that it is either long continued or permanent.

169. There have been periodic increases in the local display advertising rates of Star and Citizen; between 1940 and 1964 the rate for a typical category of advertising space rose from $1.32 to $4.05.

170. With two minor exceptions the minutes of the meetings of the Board of Directors and executives of TNI which contain a discussion of the defendants' advertising rates reflect no consideration of other media as obstacles to increasing rates.

171. Defendants' decisions on rate increases have not been substantially affected by the existence of other advertising media.

172. Although Star and Citizen have on eleven occasions in the period 1941-1964 increased their rates for local display advertising, the revenues and lineage in this portion of their advertising business increased consistently. During the period 1941 through 1964: local display advertising revenues rose from $261,161 to $4,-

407,424; local display lineage rose from 458,828 inches to 2,430,248 inches; Star and Citizen revenue per inch of local display advertising sold increased from $0.56 to $1.75; and Star and Citizen local display advertising revenues increased at a greater rate than did total retail sales in the Tucson Standard Metropolitan Area.

173. During the period 1956 to 1964, the net operating revenues of TNI increased 78.4% and revenues from local and national advertising increased 81.4%. Total radio broadcast revenues in Tucson increased 129.8% and total television broadcast revenues in Tucson 84.2%.

174. During the period 1956 to 1964 in the Tucson area TNI local display advertising revenues increased 87.3%, television local advertising revenues increased 33.2%, and radio local advertising revenues increased 131.6%.

175. During the period 1956 to 1964 TNI's national display advertising revenues increased 47.6%, radio advertising revenues from national or regional advertisers and sponsors increased 229.8% and similar television advertising revenues increased 285.0%.

176. Between 1937 and 1940, Citizen, although losing money, was unable to raise its advertising rates because of the competition from Star.

177. Star and Citizen, since beginning joint operations in 1940, have increased their local display advertising rates at least twelve times.

178. Prior to the commencement of joint operations in 1940, Citizen, although losing money, sold advertising below the rates on its rate card because of the competition from Star. Since joint operations began, Star

and Citizen have never sold advertising at a rate below that on their rate cards. This elimination of rate cutting resulted from elimination of competition in the daily newspaper business in Tucson.

179. A very substantial number of the persons who have products or services which they desire to offer and to sell to residents of Pima County feel and believe that advertising such products or services in the Star or Citizen, or both, is essential in order to enable them to reach a proper proportion of the potential buyers of their products and their services who reside in Pima County. No appreciable part of these advertisers would discontinue their advertising in Star and Citizen by reason of an increase in the advertising rates of those papers, unless such increase was inordinate or palpably unreasonable.

180. The existence of other advertising media in Tucson does not constitute an obstacle to the defendants' ability to increase the prices of advertising space in their newspapers.

181. Defendants have power over price with respect to the sale of advertising space in their newspapers.

B. *The Geographic Market*

182. The Bureau of the Budget defines a standard metropolitan area as "an integrated economic and social unit with a recognized large population nucleus"; and it classifies Pima County, in which Tucson is located, as a standard metropolitan area.

183. Since 1945, in excess of 80% of the combined daily circulation of Star and Citizen has been in Pima County.

184. With respect to some of its advertising, Star and Citizen differentiate between advertisers within Pima County and those outside of Pima County.

185. Pima County is considered by advertising agencies in Tucson to be the limits of their trading area.

186. The Audit Bureau of Circulations, an organization which audits circulation figures for newspapers, reports circulation figures for the Star and Citizen separately for Pima County.

187. Defendants in their promotional material have stressed the coverage of Star and Citizen in the standard metropolitan area.

188. In the operating agreement, Star Publishing and Citizen Publishing specifically provided that they, and their officers, stockholders, and administrative executives would not engage in any other publishing business in Pima County.

189. The Tucson Standard Metropolitan Area (Pima County) is an appropriate section of the country under Section 7 of the Clayton Act and a relevant geographic market under Section 2 of the Sherman Act.

* * * *

CONCLUSIONS OF LAW

1. The court has jurisdiction over each of the defendants and over the subject matter of this action.

2. The 1940 operating agreement constitutes a price fixing, profit pooling and market allocation agreement illegal *per se* under Section 1 of the Sherman Act.

3. The defendants, by entering into and operating pursuant to the 1940 operating agreement, acquired monopoly power over the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

4. The defendants, in entering into the operating agreement of 1940, did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

5. The acquisition of Star by Arden in 1965 was in furtherance of, and a part of, a combination and conspiracy by defendants to monopolize the daily newspaper business in Tucson.

6. Defendants have combined and conspired to monopolize interstate trade and commerce.

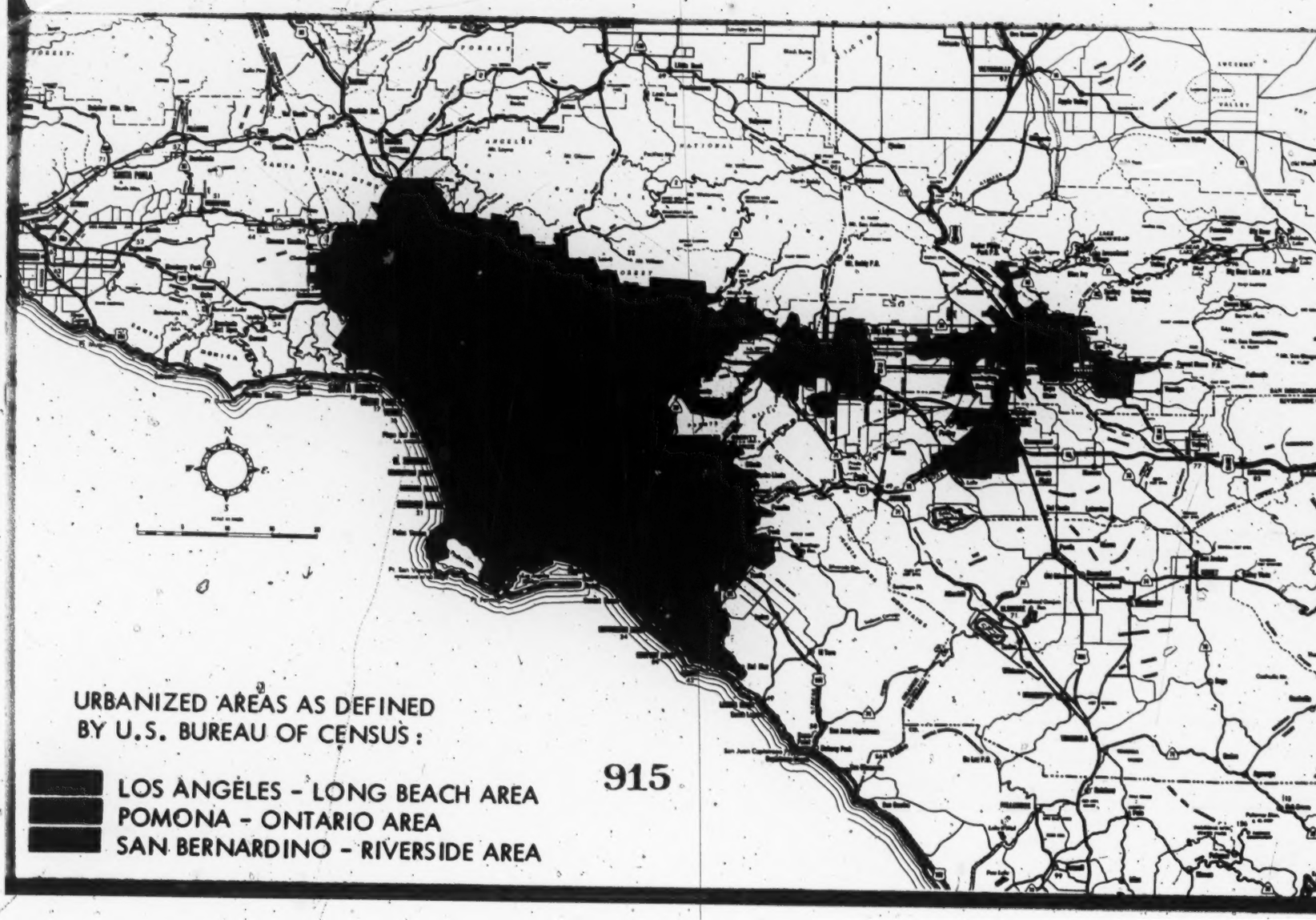
7. The acquisition of Star by Arden in 1965 was an acquisition by one corporation engaged in commerce of another corporation engaged in commerce and was a violation of Section 7 of the Clayton Act.

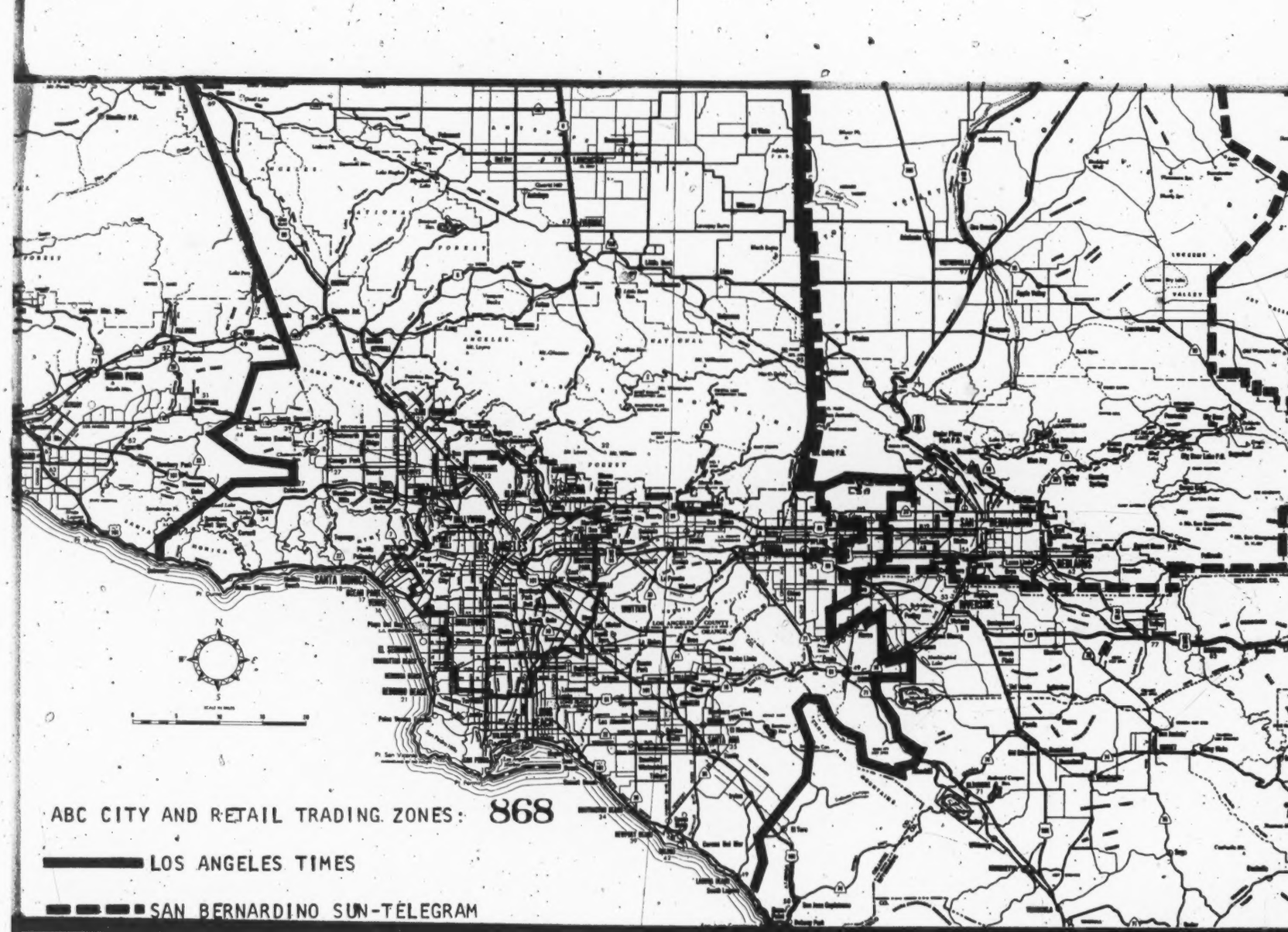
8. Plaintiff is entitled to a decree directing divestiture of Star and modification of the operating agreement.

Dated: January 31, 1968.

James A. Walsh
United States District Judge

Population distribution within the highly urbanized portions of Ventura, Los Angeles, Orange, San Bernardino and Riverside Counties, April, 1964. (Each dot represents 10,000 people.)


URBANIZED AREAS AS DEFINED
BY U.S. BUREAU OF CENSUS:
LOS ANGELES - LONG BEACH AREA
POMONA - ONTARIO AREA
SAN BERNARDINO - RIVERSIDE AREA


ABC CITY AND RETAIL TRADING ZONES: 868
LOS ANGELES TIMES
SAN BERNARDINO SUN-TELEGRAM

Los Angeles County

San Bernardino County

Claremont

Upland

Ontario

Open Space Area

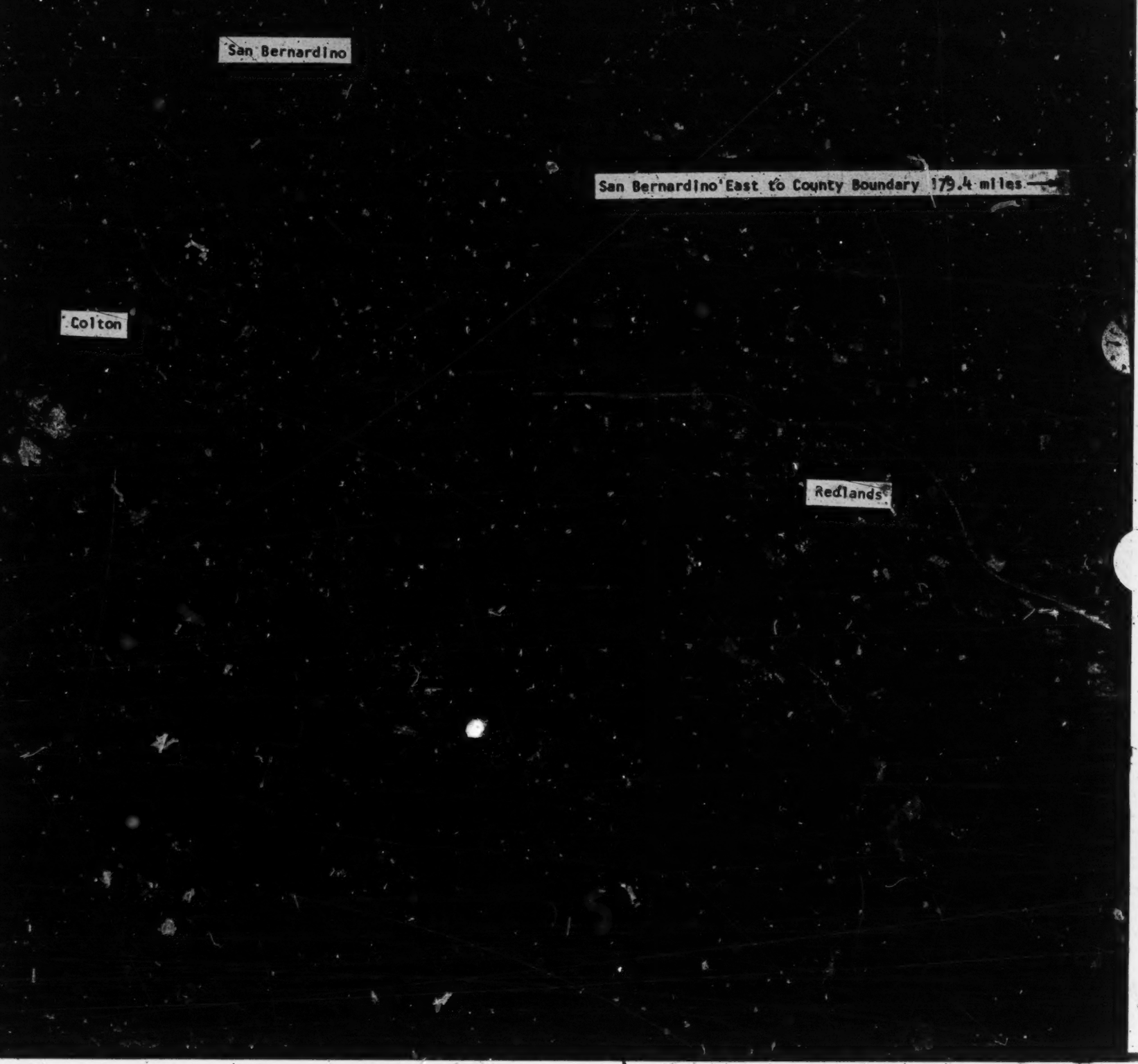
Pomona

← Pomona to L.A. Civic Center 28.4 miles

Rd 10-2

10-20-64

San Bernardino
Rialto
Fontana
Open Space Area
Colton
San Bernardino County
Riverside County
Riverside



The aerial photograph, taken on October 20, 1964, shows the Pomona sub-complex, the San Bernardino urban complex and the open space area between these complexes. A portion of adjoining Riverside County is also shown. The portion of San Bernardino County pictured comprises 382 squares miles or 1.89% of the 20,189 square miles in San Bernardino County. The scale is one inch equals 8,000 feet.

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CITATIONS

Cases:

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Times-Picayune Pub. Co. v. *United States*, 345 U.S. 594 18

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1162

THE TIMES MIRROR COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court which adjudged that appellant Times Mirror Company ("Times Mirror"), the publisher of the Los Angeles Times, the largest daily newspaper in California (J.S., App. A, 3), violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring in 1964 the Sun Company of San Bernardino, California ("Sun Company"), the largest remaining

independent daily newspaper publisher in Southern California (J.S. App. A, 4). The judgment required Times Mirror to divest itself of the Sun Company.

1. THE COMPANIES INVOLVED

TIMES MIRROR

Times Mirror is a highly diversified holding company with large interests in newspaper publishing, book publishing and commercial printing. Between 1960 and 1964, its total assets increased from $81,014,000 to $165,162,000, its revenues rose from $112,560,000 to $196,537,000 and its earnings after taxes more than doubled. A large part of its growth has resulted from a number of acquisitions. At the time of acquiring the Sun Company, Times Mirror published the Los Angeles Times ("the Times"), mornings and Sundays, and, through a wholly-owned subsidiary acquired in 1962, published the Orange Coast Daily Pilot, an evening newspaper published in four editions in the beach area south of Los Angeles. (J.S. App. A, 2–3). Between 1961 and the end of 1964, Times Mirror approached six other Southern California daily newspapers with a view toward their acquisition (GX 1A).[1]

The Times, which is Times Mirror's principal enter-

[1] Hearst's Los Angeles Herald Express (1961) [GX 56]; the Santa Barbara News-Press (1961–1962) [GX 58, GX 29, p. 11, Tr. 333]; the Oxnard Press-Courier (1963) [GX 30, pp. 49, 52, Tr. 320–321]; the Pomona Progress-Bulletin (1963) [GX 30, Tr. 309–310, 312–316; GX 32, p. 96, Tr. 316–319]; the Riverside Press-Enterprise (1963 or 1964) [GX 31, Tr. 322–324]; the Bakersfield Californian (October, 1964) [GX 31, Tr. 324–326; GX 32, Tr. 326–329].

prise, dominates the morning newspaper field in Southern California, with 70 percent of total morning circulation in its ten counties (J.S., App. A, 32). Although published in Los Angeles, it has substantial circulation and is delivered to homes throughout Southern California and maintains advertising offices and reporters, full and part-time, throughout the area, including the City of San Bernardino (J.S., App. A, 3; GX 145–10, 16; GX–1B).

Between 1960 and 1964, the Times, which is the only Los Angeles morning daily newspaper, increased its circulation from 509,982 to 790,255 (daily) and from 896,653 to 1,122,143 (Sunday) (GX 145–B, 1) and almost doubled its income (GX 145–5A). Its policy has been and is to obtain the exclusive right to all syndicated features which it purchases for an area which runs from Santa Barbara on the north to San Diego on the south and east to the Colorado River (J.S., App. A, 3), and includes part of San Bernardino County (GX–1C).

The Times publishes five suburban or zone sections, each of which is distributed as part of the Times in a specific geographic area; such sections are intended to compete with local newspapers for circulation and advertising (J.S., App. A, 3). In 1964 one of these sections was circulated on Sundays in the western part of San Bernardino County (GX 145–15), and in both 1962 and 1964 the Times' suburban advertising manager recommended that its circulation be extended to additional parts of the county (GX 131–132).

Within San Bernardino County in 1964, the Times had a weekday daily circulation of 16,650 and Sunday

circulation of 31,993. This was 10.6 percent of total weekday circulation for both morning and evening newspapers, 23.9 percent of total morning circulation and 20.3 percent of total Sunday circulation in the county (J.S., App. A, 25). The Times is circulated and home-delivered in substantial volume in all major communities throughout San Bernardino County (J.S., App. A, 5, GX 14A&B, 15A&B, 16A&B, attached hereto as appendixes), and in 1964 had the second largest morning newspaper circulation in the county (after the Sun Company's morning Sun), and the second largest Sunday circulation (after the Sun-Telegram) (GX–2B&C).

SUN COMPANY

Sun Company, then the largest independent newspaper publishing company in Southern California, was in sound financial condition at the time of its acquisition, with total assets of $4,551,261 and with net income from newspaper operations in 1964 which exceeded $1,000,000. It operated three newspapers, the morning Sun, the evening Telegram and the Sunday Sun-Telegram, and the Acme Colorprint Company. In each year from 1960 to 1964, its revenues from such operations approximated $8,000,000. (J.S., App. A, 4–5).

The combined weekday circulation of the Sun and the Telegram was nearly three times as large as that of the next largest daily published in the county and more than eight times as large as any other daily published there (J.S., App. A, 5). The Sun was the only morning newspaper published daily in San Bernar-

dino County, with 75.6 percent of total morning circulation there, and the Sun-Telegram was the largest Sunday newspaper published in the county with 44.0 percent of all Sunday circulation (J.S., App. A, 5; GX 2B, 2C). The Sun was in 1964 the third largest morning daily in Southern California and the Sun-Telegram the sixth largest Sunday newspaper in that area (GX 4B&C).

Except for the Times and the evening and Sunday Los Angeles Herald-Examiner, the Sun and Sun-Telegram were the only newspapers home delivered throughout San Bernardino County. The Sun covered the county with nine zone editions distributed to specific areas (GX 145–25). In addition to local news, both the Sun and the Sun-Telegram carried a substantial amount of state, national and international news, complete stock reports of the New York and American Stock Exchanges, national sports news, nationally known columnists, comics and other syndicated features, and Los Angeles radio and television logs (J.S., App. A, 5).

San Bernardino County[2] encompassed virtually

[2] San Bernardino County is the largest county in the United States. Its western edge is approximately 35 miles east of Los Angeles, and its eastern boundary is the Colorado River—some 200 miles away. The county's population was more than 600,000 in 1965, and is expected to approximate one million by 1980 (GX 17). At present, most of the population is clustered at the western end of the county. George Air Force Base, 30 miles north of San Bernardino, is surrounded by small communities such as Victorville, and Barstow is a rail center in the mid-section of the county. East of the City of San Bernardino there is a vast expanse of mountain and desert, throughout which numerous resort and desert communities are located.

the entire area of circulation and home delivery overlap between the Times and Sun Company's newspapers (J.S., App. A, 25; see GX 14A&B, 15A&B, and 16A&B, attached hereto as Appendices).

2. THE DECISION OF THE DISTRICT COURT

After a seven-week trial during which newspapermen, advertisers, economists and journalism experts testified, and extensive industry data and company documents were received in evidence, the district court held that the acquisition had the effect of substantially lessening competition in the daily newspaper business in San Bernardino County (J.S., App. A, 34). In concluding that the effects of the acquisition can properly be measured in the daily newspaper business in that county, the court laid heavy emphasis upon the fact that the defendant itself, in evaluating the acquisition, had used that line of commerce in that geographic area as the relevant market (J.S., App. A, 26; see GX 99, 6–10; GX 100, Schedules D and E).

In further rejecting the argument advanced here by appellant that "there can be no appropriate product market which includes both the Times and the Sun" (J.S., App. A, 15–20), the court held that the "daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product," basing its conclusion upon "practical indicia" such as industry and public recognition, unique methods of production, distribution and pricing, and the unique cluster of services in a single package provided by daily newspapers (J.S., App. A, 20–21). The

court, using similar criteria, further found that morning, evening and Sunday newspapers were sufficiently distinctive to constitute submarkets within the daily newspaper market (J.S., App. A, 21–22).

The court found that this acquisition constituted a prima facie violation of Section 7 because it resulted in the combined papers having 54.8 percent of total weekday, 99.5 percent of total morning and 64.3 percent of total Sunday circulation (J.S., App. A, 23). In addition, the court found that the Times and Sun had competed prior to the acquisition for national advertising and that such competition had been lessened following the acquisition (J.S., App. A, 24).

The court found that this acquisition occurred in an area, Southern California, where "there was already a heavy concentration of daily newspaper ownership" and where "[t]here has been a steady decline of independent ownership of newspapers." It noted that in Southern California four publishers accounted for 71 percent of all weekday daily newspaper circulation, three accounted for over 85 percent of all morning circulation and two accounted for about 66 percent of all Sunday circulation; and that the number of independent dailies had declined from 39 to 20 between January 1, 1952, and December 31, 1966. A similar trend was noted in San Bernardino County where six of the seven dailies published were independently owned in 1952, while only three of eight remained independent at the end of 1966 (J.S., App. A, 30–31).

The court held that the acquisition was "particularly anticompetitive because it eliminated one of the

few independent papers which had been able to operate successfully in the morning and Sunday fields," despite the strength of the Times' circulation throughout Southern California (J.S., App. A, 31–32), and that the acquisition had raised "a barrier to entry of newspapers in the San Bernardino County market that is almost impossible to overcome" (J.S., App. A, 33).

ARGUMENT

The district court held that the acquisition by the second largest morning and Sunday newspapers in San Bernardino County of the largest morning and Sunday newspapers there (GX 2B&C, 14A&B, 15 A&B, 16A&B) violated Section 7 of the Clayton Act because its effect was substantially to lessen competition in the daily newspaper business in San Bernardino County. This conclusion rested upon the following subsidiary findings:

1. Both the Times and the Sun had a substantial number of buyers in San Bernardino County;

2. Both the Times and the Sun were offered for sale at the same time of the day throughout San Bernardino County;

3. While not identical, the Times and the Sun both offered substantial amounts of similar news stories, features and advertising;

4. Both the Times and the Sun were daily newspapers—a product which is separate and distinct from any other product;

5. Morning papers constitute a submarket within the daily newspaper field, and morning papers tend to

compete more vigorously for circulation with each other than they do with evening newspapers;

6. Sunday newspapers constitute a submarket within the daily newspaper field;

7. The Times and Sun competed for advertising prior to the acquisition;

8. The acquisition gave Times Mirror 99.5 percent of total morning circulation, 54.8 percent of total weekday circulation and 64.3 percent of total Sunday circulation in the geographic market (San Bernardino County) which Times Mirror itself used as the relevant market to evaluate the effects of this acquisition.

Appellant challenges the court's findings that the daily newspaper business was a relevant product market and that San Bernardino County was a relevant geographic market within which to evaluate the effects of the acquisition. The criteria for delineating the relevant product and geographic markets under Section 7 have been thoroughly defined by this Court in previous Section 7 cases. See, *e.g.*, *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; *United States* v. *Continental Can Co.*, 378 U.S. 441; *Brown Shoe Co.* v. *United States*, 370 U.S. 294. There is no issue concerning the application of those criteria to the facts of this case that warrants plenary argument.

1. THE COURT CORRECTLY DETERMINED THAT THE DAILY NEWSPAPER BUSINESS IN SAN BERNARDINO COUNTY WAS A "RELEVANT MARKET" IN WHICH TO MEASURE THE EFFECTS OF THE ACQUISITION

THE PRODUCT MARKET

The record amply supports the district court's finding (made after examination of comparable copies of the two newspapers (GX 90A–F, 92, 106A–G; Tr. 524–531)) that daily newspapers constitute an appropriate product market and that both the Times and the Sun are a part of that market. There is no confusion on this point among newspaper readers, advertisers, economists or publishers; all recognize that the daily newspaper is a unique product for which there is no substitute. (Pinkley, Tr. 966–972; Hays, Tr. 789–791; Peterson, Tr. 3049–3050; Markham, Tr. 3783–3784, 3787–3794; GX 175.) As the court stated (J.S., App. A., 22), "the daily newspaper business is a commercial reality which is universally recognized as a line of commerce." See, also, *Crown Zellerbach Corp.* v. *Federal Trade Commission,* 296 F. 2d 800, 813 (C.A. 9), certiorari denied, 370 U.S. 937: "[A]s a practical matter no one in the industry or interested in it or having anything to do with it has any difficulty in distinguishing [it] * * *."

Appellant's principal contention is that, although the Times and the Sun were admittedly daily newspapers which were offered for sale side by side on news-stands, and home delivered throughout San Bernardino County, they were not in the same product

market because each carried a substantial amount of material which the other did not. It argues that there was an insufficient showing of "interchangeability of use and cross-elasticity of demand" between the papers to justify treating them as competing products.[8]

[8] This contention, explored at length at the trial, was based in large part upon the inability of appellant's expert economic witness, Dr. Phillips, to find evidence of cross-elasticity after an analysis of the price-sensitivity of the two newspapers in the "San Bernardino city zone" (Tr. 1444). Dr. Phillips testified that his analysis was based upon DX 808, and admitted that errors in that exhibit would result in his drawing erroneous conclusions (Tr. 1580). He further admitted that DX 808 failed to take account of such important factors as the marketing and promotional activities of the publishers (Tr. 1592–1593), the increases in the Sun's national, international and financial news coverage (Tr. 1611), the newsprint shortage which ended in 1946 (Tr. 1594), and the price changes, circulations and demise of the Los Angeles Examiner and the Mirror-News which had been distributed in San Bernardino prior to 1962 (Tr. 1612–1613). Even more important, Dr. Phillips admitted he had been unaware that the geographic area selected for circulation comparison in DX 808 was not the same for the Times and Sun and that it varied for each paper during the period studied (Tr. 1585–1589, 1732–1734). Thus the study contained inconsistencies causing it to reflect circulation changes unrelated to any price activity, and these defects undermined Dr. Phillips' conclusions concerning the effects of price changes on circulation. Subsequently (in DX 808A) Dr. Phillips corrected the Times' figures but still failed to conform the Sun's circulation measurement area to the Times', and in all other respects left DX 808A with the same shortcomings as DX 808.

Furthermore, despite the fact that circulation variations of as little as 8 percent were deemed sufficient by Dr. Phillips for drawing his initial conclusions (Tr. 1763–1766), he insisted that changes of the magnitude of 20 percent between the circulation figures used in DX 808 and those used in DX 808A made no difference in his conclusions (Tr. 1763).

Finally, while Dr. Phillips attempted to relate price increases to circulation changes for the Sun and Times (cross-elasticity

Appellant's position ignores the realities of competition in the newspaper business. A newspaper is not a homogeneous product, but a package of hundreds of different items of information, opinion and entertainment designed to appeal to the preferences of a maximum number of readers within its circulation area. A newspaper competes for circulation, not primarily by seeking to undersell its rivals, but by developing a blend of news, features and services which will have a broad appeal to readers of widely varying tastes. Competition based on quality and composition of product, no less than price competition, is protected by the antitrust laws. See *United States* v. *Continental Can Co., supra,* at 455–456. Because the price of a newspaper is nominal, and because it constitutes only one competitive element, it is neither surprising nor significant to find that demand may not be immediately responsive to relatively insubstantial price changes. The daily newspaper business is clearly one in which over-reliance on cross-elasticity of demand in response to mere price changes will obscure, rather than identify competition. See *United States.* v. *Continental Can Co., supra,* at 453; *Brown Shoe Co.* v. *United States, supra,* at 326.

Appellant itself has recognized these realities of competition in the daily newspaper business by insisting on exclusive use of its syndicated features in the areas of its principal circulation (J.S. App. A,

of demand), he admitted that, although testifying as an expert, he had never studied the crucial question—how large a price change is necessary before subscribers will switch from one newspaper to another (Tr. 1603–1604).

3). San Bernardino readers who choose the Times because of particular features available therein might well rely upon the Sun or other county newspapers to the exclusion of the Times if they also carried such features.[4]

The record fully supports the district court's inclusion of the Times and the Sun in a single product market. One of appellant's own experts admitted that for "most people living in the City of San Bernardino the Sun would be a complete newspaper," which he had previously defined as being a newspaper which "make[s] it unnecessary to read another metropolitan paper * * * [i]n order to be informed" (Tr. 4259–4260, 4256). Otis Chandler, publisher of the Times, conceded that "in the very broadest sense of competition," the Times competed daily and Sunday with the Sun newspapers in many substantial communities throughout the county (Tr. 562). Independent newspapermen testified that their dailies compete for circulation with the Times and all other dailies which entered their circulation area (Tr. 754–757, 762–763, 975–977, 3941–3945, 3962). The publisher of the *Riverside Press-Enterprise*, whose papers and market are markedly similar to that of the Sun newspapers, stated that the Times was his most important competitor for circulation (Tr. 754), and

[4] The Editor of the Sun, G. David Ackley, testified that there are people who will buy a daily newspaper simply to check the racing results or the stock market quotations (Tr. 697). Since both the Sun and the Times carried these and many other similar items, it is clear that for many readers they were in fact effective substitutes for each other despite variations in total content.

that his morning paper competed with the Times for circulation throughout Riverside County—the area where their circulations overlap (Tr. 757). Finally, a Southern California newspaper publisher, who was the former editor and publisher of the Los Angeles Mirror-News and a former Sun employee, stated that the Times and the Sun competed at the time of the acquisition (Tr. 1001–1003).

In delineating the relevant market, the district court did not apply a different standard from that applied in *United States* v. *Citizen Publishing Co.* (Civ. No. 1969—Tucson, D. Ariz., January 31, 1968). In that case, out-of-town newspapers circulating in Pima County, Arizona (including the Los Angeles Times), were excluded from the relevant market in measuring the market power of the two merging Tucson newspapers because they did not carry sufficient news of local interest to Tucson readers to make them substitutes for the local newspapers. But there the lack of effective competition by out-of-town dailies was shown by the fact that the two Tucson papers had a combined circulation of 73,799, while the combined circulation of *all* out-of-town papers was only 3,379—approximately 4.4 percent of the total circulation (J.S. App. B, 9—Finding 112). The circulation of the Times in San Bernardino County was far greater: more than 16,000 daily and 31,000 Sunday, constituting 10.6 percent of the weekday daily, 23.9 percent of the morning, and 20.3 percent of the Sunday market.[5] As already

[5] Market shares were computed here against a total which included in the San Bernardino County market the circulation of out-of-town papers such as the New York Times and the

pointed out, although the contents of the Times and the Sun are different, such differences are ones of degree. The Times, a Southern California newspaper, carries much more news of interest to readers in adjacent San Bernardino County, California, than it does for readers in Pima County, Arizona, and was therefore, as the record shows, a substantial competitor in the former, but a miniscule competitive factor in the latter market.

B. THE GEOGRAPHIC MARKET

The effects of an acquisition may appropriately be tested in any economically significant area of the United States. See *United States* v. *Pabst Brewing Co., supra.* San Bernardino County is not only a large and economically significant area, but encompassed virtually the entire area of circulation overlap between the Times and the Sun prior to the acquisition (See GX 14A&B; 15A&B; 16A&B; attached as appendices.)

Appellant's attack on the district court's choice of San Bernardino County as an appropriate geographic market rests on the contention that this county is merely a political boundary and does not conform to economic reality (J.S., 37). The court's opinion refutes this contention; the court recognized that political and administrative boundaries are not necessarily market boundaries for antitrust pur-

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Washington Post, which do not attempt to provide news of purely local interest for Southern California readers. But appellant can hardly complain that this was error, since its effect would be *de minimis* and to the benefit of appellant in the computation of market shares.

poses, and it carefully weighed the commercial realities of the situation. Among other things, the court emphasized that numerous newspaper and advertiser reference sources, including Audit Bureau of Circulations, American Newspaper Markets, Inc., and Standard Rate and Data Service, as well as Times Mirror and Sun Company promotional brochures prepared for advertisers, all recognized San Bernardino County as a newspaper market; and it noted that Times Mirror itself, in evaluating the acquisition, used the daily newspaper business in San Bernardino County as the relevant market (J.S., App. A, 25–26).

The court thus applied precisely the type of "practical indicia" identified as significant by this Court in *Brown Shoe Co.* v. *United States, supra* at 325. Both *Brown Shoe, supra,* at 337, n. 65, and the district court (J.S., App. A, 26–27) also fully answered appellant's other argument that the County cannot be the relevant geographic market because of the small share of the Times' total circulation which is found there.

2. THE ACQUISITION HAD THE EFFECT OF SUBSTANTIALLY LESSENING COMPETITION IN THE DAILY NEWSPAPER BUSINESS IN SAN BERNARDINO COUNTY

A. COMPETITION FOR CIRCULATION

That the acquisition of the dominant newspaper publisher in San Bernardino County by the second largest seller of newspapers in that county, resulting in a market share for the acquirer of 54.8 percent of total weekday circulation, 99.5 percent of total morning circulation, and 64.3 percent of total Sunday cir-

culation, violates Section 7 is settled by the decisions of this Court condemning mergers of competitors. Appellant's assertion (J.S. 10) that this is not such a merger, and that the court below rejected the government's claim that the acquisition involved competing newspapers, is contradicted by the court's use of product and geographic markets encompassing sales of both papers and its use of combined market shares to test the effect of the acquisition, and the persuasive evidence discussed *supra* that the Times and the Sun competed for circulation prior to the acquisition.

Moreover, "the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent." *United States* v. *Continental Can Co., supra,* at 458. The Times, with its ability to distribute newspapers throughout the county, and strong reader acceptance as demonstrated by its volume of sales, was the only newspaper in a position to challenge the dominant position of the Sun in San Bernardino County. To the extent that its ability to penetrate the market was limited by the Sun's advantage in coverage of purely local news, the Times had the potential, by expansion of a zone edition, to compete more effectively in this area. That the Times so recognized is demonstrated by its active consideration prior to the acquisition of extension of one of its zone sections further into the county (GX 131, Phase II, p. 1; GX 132, Alternative #2). Conversely, the Sun was obliged to maintain its advantage in local coverage and to seek to improve its product in terms of news and features in which the Times excelled in order to prevent further inroads

into its circulation. Since the acquisition, the Times has assumed and exercised active control of the management of the Sun (J.S., App. A, 33–34); under common control there is no longer any incentive for either paper to improve its product for the purpose of attracting readership away from the other or preventing its readers from being diverted to the other.

B. COMPETITION FOR ADVERTISING

"[E]very newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 610.

Daily newspapers which circulate in substantial numbers in any area are generally competitors for advertising in that area. Since the Times was and is the second largest morning and the second largest Sunday paper (in terms of circulation) available in San Bernardino County, it is an important factor in that market, and an available advertising medium for the large group of advertisers (such as national advertisers and Southern California retail chain stores) who distribute their products in both the Los Angeles and the San Bernardino areas.

The record supports the court's findings that advertising is the lifeblood of a daily newspaper, accounting for the largest share of its revenues; and that the Times competed with the Sun for advertising (J.S., App. A, 24). The recognition by both the Sun and the Times that they competed for national adver-

tising was shown by testimony (Tr. 621, 664–665) and by promotional advertising (Sun, GX 95, Tr. 1140–1141; Times, GX 108A, 6, 7), including the Sun's long-standing advertising campaign in major trade journals which sought to persuade national advertisers not to rely on the Los Angeles dailies for coverage of the San Bernardino market (GX 116A–M, 117A–G, 118A, 119A–D). The abandonment of this campaign after the acquisition, which the court found to have been "as [a] result of suggestions from executives of the Times" (J.S., App. A, 34), dramatically demonstrates the lessening of competition for national advertising caused by the acquisition. (Compare GX 116M with GX 116N&S, Tr. 616–620).[6]

C. BARRIERS TO ENTRY

The court's finding that this acquisition raised a barrier to entry in the San Bernardino County newspaper market almost impossible to overcome is amply supported by the record. One Southern California publisher testified that the Sun had been markedly strengthened by its affiliation with the Times and that if he "were looking for a market in which to start a newspaper, I can assure you it would not be San Bernardino County" (Pinckley, Tr. 1003–1004). Another publisher who had left the daily market in San Bernardino County following the acquisition

[6] National advertising, which in 1963 accounted for more than $500,000 of Sun Company's newspaper revenues (GX 147–7, Tr. 522), is the most lucrative form of newspaper advertising because it commands higher rates and entails lower production and sales cost than does local advertising (Tr. 604–605, 815–816, 828–829, 991–992).

said he would be much more reluctant to start a daily paper in Rialto (in San Bernardino County) now than when he first did so, several years before (Jones, Tr. 950, 954). An acquisition which substitutes a far more powerful firm for a smaller but already dominant firm, with the result that barriers to entry are enhanced and smaller firms are dissuaded from aggressively competing, has dangerous anticompetitive effects. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 578.[7]

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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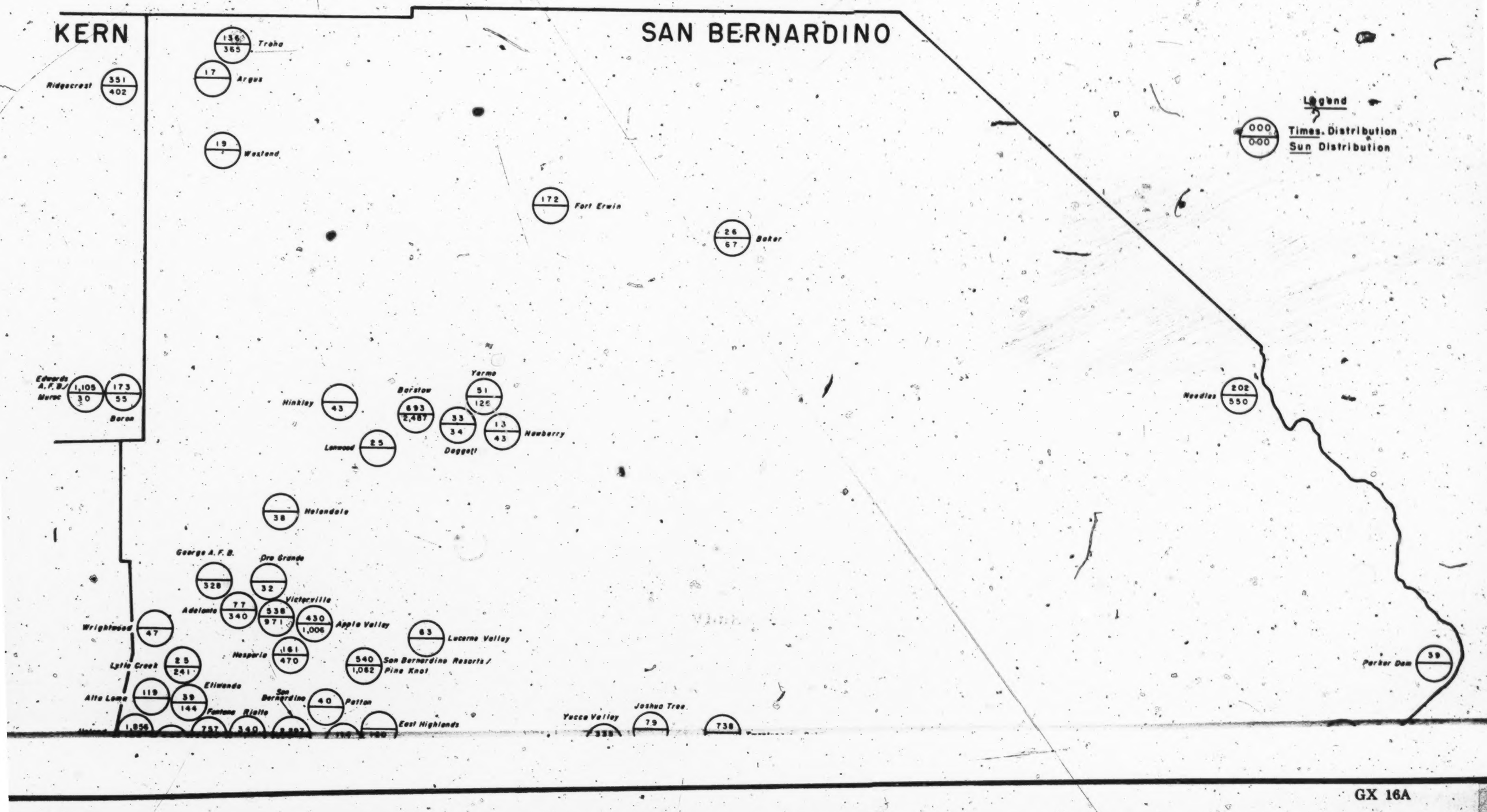
APRIL 1968.

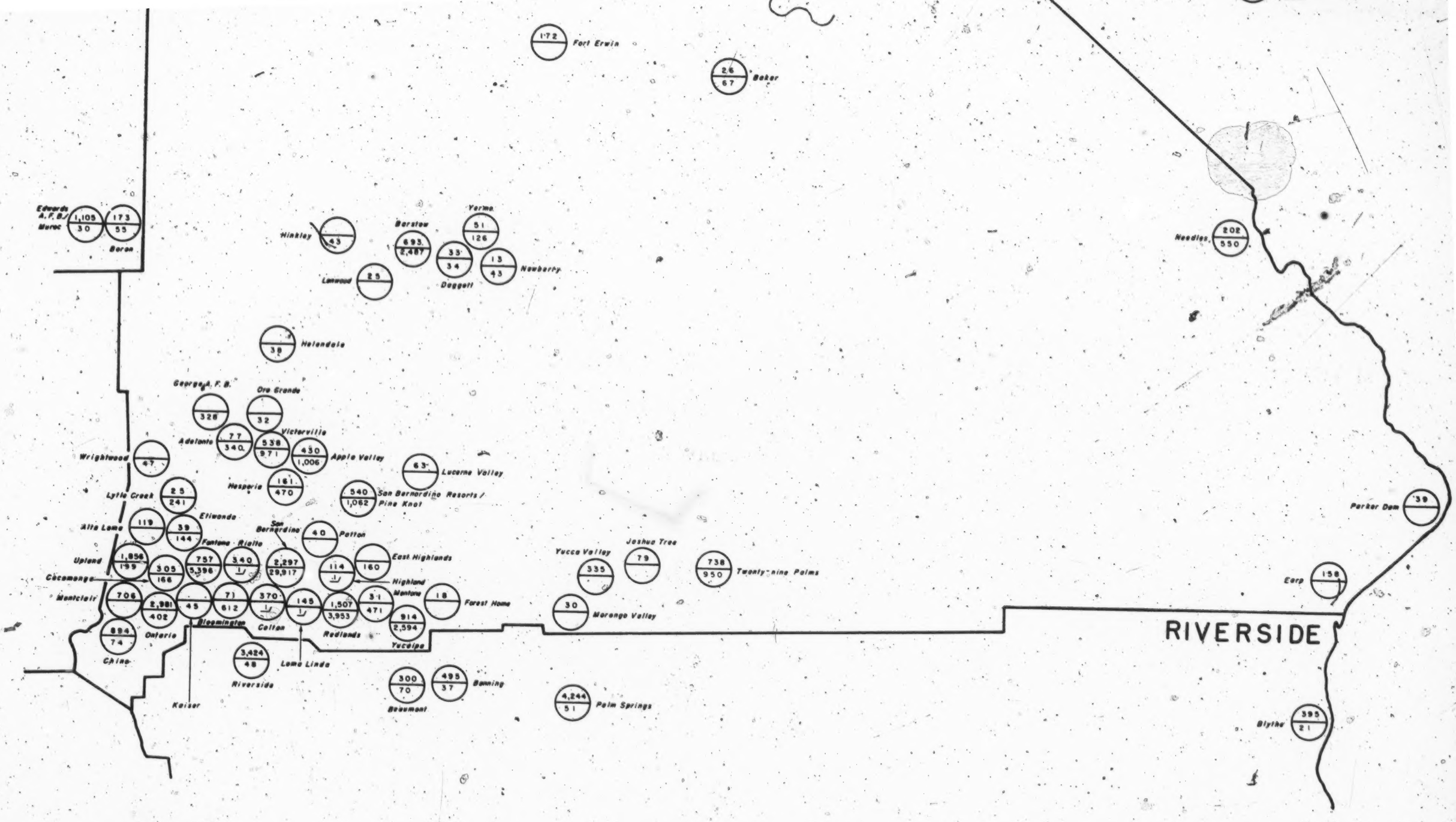
[7] The fact that a small weekly paper in the outlying desert community of Victorville commenced daily publication after the acquisition, an event of which the court below was fully cognizant (J.S., App. A, 36), in no way establishes that its conclusion with respect to barriers to entry was erroneous. The applicability of § 7 does not depend on a showing that the challenged acquisition has made barriers to entry insuperable; it is enough that barriers to entry have been substantially enhanced. See *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. at 579. In any event, the Victorville Daily Press is an evening paper; its transition to daily publication is wholly irrelevant to the question of barriers to entry in the morning submarket (Tr. 3959).

CIRCULATION OVERLAP OF THE MORNING LOS ANGELES TIMES AND THE MORNING SAN BERNARDINO SUN 1964

GX 14A



GX 16A


Fort Erwin
172
Baker
26
67
Edwards A.F.B./ Muroc
1,105
30
173
55
Boron
Hinkley
43
Lenwood
25
Barstow
693
2,487
Yermo
51
126
33
34
Daggett
13
43
Newberry
Helendale
39
George A.F.B.
328
Oro Grande
32
Victorville
77
340
538
971
Adelanto
430
1,006
Apple Valley
Wrightwood
47
Lytle Creek
25
241
Hesperia
161
470
63
Lucerne Valley
540
1,062
San Bernardino Resorts / Pine Knot
Alta Loma
119
Etiwanda
39
144
San Bernardino
40
Patton
Fontana
Rialto
Upland
1,856
199
757
5,396
340
2,297
29,917
East Highlands
114
160
Highland
Cucamonga
305
166
Montclair
706
2,981
402
Ontario
45
71
612
Bloomington
370
Colton
145
1,507
3,953
Redlands
31
471
Mentone
18
Forest Home
914
2,594
Yucaipa
894
74
Chino
3,424
48
Riverside
Lomo Linda
Kaiser
300
70
Beaumont
495
37
Banning
Yucca Valley
335
Joshua Tree
79
738
950
Twenty-nine Palms
30
Morongo Valley
4,244
51
Palm Springs
Needles
202
550
Parker Dam
39
Earp
158
RIVERSIDE
Blythe
395
21

SOURCE: 14B

Circulation overlap of the morning Los Angeles Times and the morning San Bernardino Sun—1964

Community	Morning	
	Times	Sun
SAN BERNARDINO COUNTY		
Adelanto	77	340
Alta Loma	119	—
Apple Valley	430	1,006
Argus	17	—
Baker	26	67
Barstow	693	2,487
Bloomington	71	612
Chino	894	74
Cucamonga	305	166
Daggett	33	34
Earp	158	—
East Highlands	—	160
Etiwanda	39	144
Fontana	757	5,396
Forest Home	18	—
Fort Irwin	172	—
George A.F.B	—	328
Helendale	—	38
Hesperia	161	470
Hinkley	—	43
Joshua Tree	79	—
Kaiser	—	45
Lenwood	25	—
Lucerne Valley	63	—
Lytle Creek	25	241
Mentone	31	471
Montclair	706	—
Morongo Valley	30	—
Needles	202	550
Newberry	13	43
Ontario	2,981	402
Oro Grande	—	32
Parker Dam	39	—
Pine Knot [1]	540	1,062
Redlands	1,507	3,953
San Bernardino City Zone	[2]	[3] 29,917
San Bernardino	2,297	[4]
Colton	370	[4]
Highland	114	[4]
Loma Linda	145	[4]
Patton	40	[4]
Rialto	340	[4]
Trona	136	365
Twenty-nine Palms	738	950
Upland	1,856	199
Victorville	538	971
Westend	19	—
Wrightwood	—	47
Yermo	51	126
Yucaipa	914	2,594
Yucca Valley	335	—
Balance of County	81	230
Total San Bernardino County	[3] 16,650	[3] 52,636
RIVERSIDE COUNTY		
Banning	495	87
Beaumont	300	70
Blythe [5]	395	21
Palm Springs	4,244	51
Riverside	8,424	48
KERN COUNTY		
Boron	173	55
Muroc [6]	1,105	30
Ridgecrest	351	402

[1] Reported by *Sun* as "Pine Knot" and by the *Times* as "San Bernardino Mountain Resorts."

[2] No San Bernardino City Zone figure reported by *Times*. See following 6 communities for comparable area.

[3] Adjusted ABC Audit Report figure.

[4] Included in San Bernardino City Zone.

[5] Whereas the source used (Sun ABC Audit Report) does not usually report individual community circulations of less than 25, in this instance it did, and the figure reported is shown here.

[6] Reported by *Sun* as "Muroc" and by the *Times* as "Edwards A.F.B."

NOTE.—*Sun* ABC circulation for all communities reported. *Times* ABC circulation for all San Bernardino County communities reported, and for neighboring out-of-county communities where *Sun* circulation is reported.

Source:

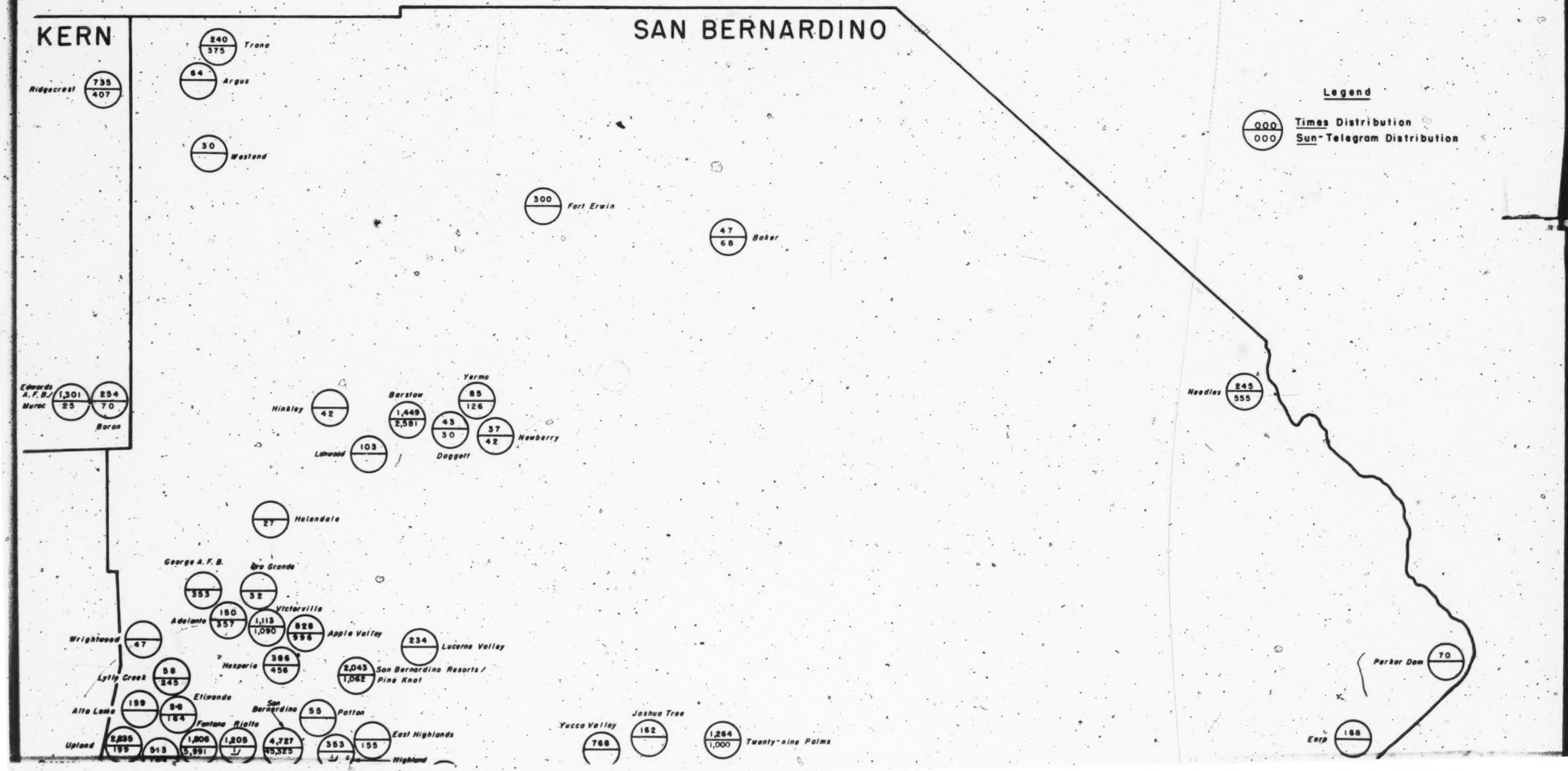
Times—ABC Audit Report (12 months ending Mar. 31 1964).

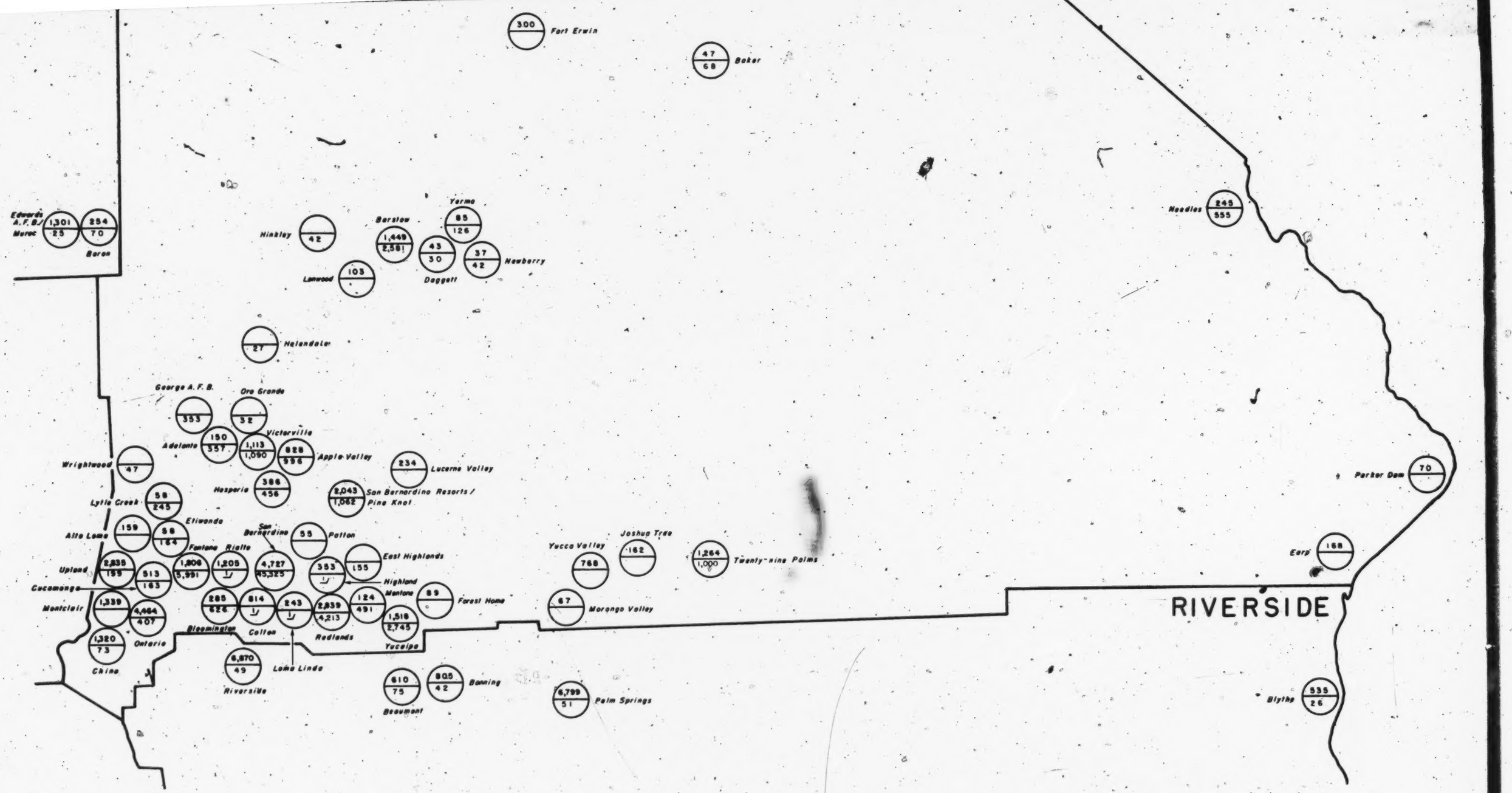
Sun—ABC Audit Report (12 months ending Sept. 30 1964).

GX 15A

CIRCULATION OVERLAP OF THE SUNDAY LOS ANGELES TIMES AND THE SUNDAY SAN BERNARDINO SUN-TELEGRAM

1964




300
Fort Erwin
47
68
Baker
Needles
245
555
Parker Dam
70
Edwards A.F.B./ Muroc
1,301
25
254
70
Boron
Hinkley
42
Barstow
1,449
2,581
Yermo
85
126
43
30
Daggett
37
42
Newberry
Lenwood
103
27
Helendale
George A.F.B.
353
Oro Grande
32
150
357
Victorville
Adelanto
1,113
1,090
828
996
Apple Valley
234
Lucerne Valley
Wrightwood
47
Hesperia
386
456
2,043
1,062
San Bernardino Resorts / Pine Knot
Lytle Creek
58
245
Etiwanda
159
Alta Loma
58
164
San Bernardino
55
Patton
Fontana
Rialto
1,808
5,991
1,205
4,727
45,325
353
155
East Highlands
Highland
Upland
2,835
189
513
183
Cucamonga
Montclair
1,339
4,464
407
285
626
814
243
2,839
4,213
124
491
Mentone
89
Forest Home
1,518
2,745
Yucaipa
Redlands
Colton
Bloomington
Ontario
1,320
73
Chino
6,870
49
Riverside
Loma Linda
610
75
Beaumont
805
42
Banning
Yucca Valley
768
Joshua Tree
162
1,264
1,000
Twenty-nine Palms
67
Morongo Valley
6,799
51
Palm Springs
Earp
188
Blythe
535
26
RIVERSIDE

SOURCE: 15B

Circulation overlap of the Sunday Los Angeles Times and the Sunday San Bernardino Sun-Telegram—1964

Community	Sunday	
	Times	Sun-Telegram
SAN BERNARDINO COUNTY		
Adelanto	150	367
Alta Loma	159	—
Apple Valley	828	996
Argus	64	—
Baker	47	68
Barstow	1,449	2,581
Bloomington	285	626
Chino	1,320	73
Cucamonga	513	163
Daggett	43	30
Earp	168	—
East Highlands	—	155
Etiwanda	58	164
Fontana	1,806	5,991
Forest Home	89	—
Fort Irwin	300	—
George A.F.B.	—	358
Helendale	—	27
Hesperia	386	456
Hinkley	—	42
Joshua Tree	162	—
Lenwood	103	—
Lucerne Valley	234	—
Lytle Creek	58	245
Mentone	124	491
Montclair	1,230	—
Morongo Valley	67	—
Needles	245	555
Newberry	37	42
Ontario	4,464	407
Oro Grande	—	32
Parker Dam	70	—
Pine Knot [1]	2,043	1,082
Redlands	2,839	4,213
San Bernardino City Zone	(2)	[3] 45,225
San Bernardino	4,727	(4)
Colton	814	(4)
Highland	353	(4)
Loma Linda	243	(4)
Patton	55	(4)
Rialto	1,205	(4)
Trona	240	375
Twenty-nine Palms	1,264	1,000
Upland	2,835	199
Victorville	1,113	1,090
Westend	30	—
Wrightwood	—	47
Yermo	85	126
Yucaipa	1,518	2,745
Yucca Valley	768	—
Balance of County	119	243
*Total San Bernardino County	[3] 31,993	[3] 69,389
RIVERSIDE COUNTY		
Banning	805	42
Beaumont	610	75
Blythe	535	26
Palm Springs	6,799	51
Riverside	6,870	49
KERN COUNTY		
Boron	254	70
Muroc [5]	1,301	25
Ridgecrest	735	407

[1] Reported by *Sun-Telegram* as "Pine Knot" and by the *Times* as "San Bernardino Mountain Resorts."

[2] No San Bernardino City Zone figure reported by the *Times*. See following 6 communities for comparable area.

[3] Adjusted ABC Audit Report figure.

[4] Included in San Bernardino City Zone.

[5] Reported by *Sun-Telegram* as "Muroc" and by the *Times* as "Edwards A.F.B."

NOTE.—*Sun-Telegram* ABC circulation for all communities reported. *Times* ABC circulation for all San Bernardino County communities reported, and for neighboring out-of-county communities where *Sun-Telegram* circulation is reported.

Source:

Times—ABC Audit Report (12 months ending Mar. 31 1964).

Sun—ABC Audit Report (12 months ending Sept. 30, 1964).

1964

KERN

SAN BERNARDINO

RIVERSIDE

KEY

Home Delivered by:

- ● Both Times and Sun
- (T) Times only
- (S) Sun only

China Lake
Ridgecrest
Boron
Trona
Argus
Westend
Fort Irwin
Baker
Barstow
Yermo
Daggett
Lenwood
Needles
Parker Dam
Earp
Yucca Valley
Joshua Tree
Twenty-nine Palms M. B.
Twenty-nine Palms
Lucerne Valley
Big Bear
Big Bear City
Lake Arrowhead
Crestline
Hesperia
Apple Valley
Victorville
Adelanto
Oro Grande
George A. F. B.
Devore
Lytle Creek
Alta Loma
Etiwanda
Cucamonga
Upland
Fontana
Rialto
Muscoy
San Bernardino
Colton
Del Rose
Patton
Highland
E. Highlands
Norton A. F. B.
Mentone
Redlands
Yucaipa
Calimesa
Montclair
Bloomington
Ontario
Chino
Loma Linda
Bryn Mawr
Crestmore
Forest Home
Oak Glenn

Baker

Needles

Boron

Barstow

Yermo (T)

Daggett (S)

Lenwood (T)

George A. F. B.

Oro Grande

Victorville

Adelanto

Apple Valley

Hesperia

Lucerne Valley (T)

Crestline

Lake Arrowhead

Big Bear

Big Bear City

Lytle Creek

Devore

Alta Loma

Etiwanda

Muscoy

Del Rosa (T)

Patton

Highland

Cucamonga

Rialto

San Bernardino

E. Highlands

Upland

Fontana

Colton

Norton A. F. B.

Montclair (T)

Bloomington

Mentone

Forest Home

Ontario

Lomo Linda (S)

Redlands

Oak Glenn (S)

Chino

Yucaipa

Bryn Mawr

Crestmore Village

Grand Terrace

Colimesa

Cherry Valley

Banning

Beaumont

Joshua Tree

Twenty-nine Palms M. B.

Twenty-nine Palms

Yucca Valley

Desert Hot Springs

Parker Dam (T)

Earp (T)

RIVERSIDE

Blythe

SOURCE: GX 16B.

296-109 O-68 (Face p. 16B)

HOME DELIVERY OVERLAP OF THE LOS ANGELES TIMES AND THE SAN BERNARDINO SUN—1964

HOME DELIVERY OF BOTH TIMES AND SUN

Adelanto
Alta Lomo
Apple Valley
Baker
Banning (Riv.)
Barstow
Beaumont (Riv.)
Big Bear [1]
Big Bear City [1]
Blythe (Riv.)
Bloomington
Boron (Kern)
Calimesa
Cherry Valley (Riv.)
China Lake (Kern)
Chino
Colton
Crestline
Crestmore Village
Cucamonga
Del Rosa
Desert Hot Springs (Riv.)
Devore
East Highlands
Etiwanda
Fontana
Forest Home
Fort Irwin
George A. F. B.
Grand Terrace
Hesperia
Highland
Joshua Tree
Lake Arrowhead [1]
Lomo Linda
Lytle Creek
Mentone
Muscoy
Needles
Norton A. F. B.
Ontario
Oro Grande
Redlands
Rialto
Ridgecrest (Kern)
San Bernardino
Trona
Twenty-nine Palms
Twenty-nine Palms M. B.
Upland
Victorville
Yucaipa
Yucca Valley

NOTE.—Cities and communities are in San Bernardino County unless otherwise indicated.

[1] Home delivery reported by the *Sun* for these communities correspond with the area reported by the *Times* as San Bernardino Mountain Resorts.

Source: Stipulation, Para. 20 and 87.

HOME DELIVERY OF THE TIMES ONLY

Argus
Earp
Lenwood
Lucerne Valley
Montclair
Parker Dam
Patton
West End
Yermo

HOME DELIVERY OF THE SUN ONLY

Bryn Mawr
Daggett
Oak Glen

U.S. GOVERNMENT PRINTING OFFICE: 1947 208-100

Supreme Court of the United States

October Term, 1967
No. 1162

THE TIMES MIRROR COMPANY,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

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634 South Spring Street,
Los Angeles, Calif. 90014,
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ROBERT F. ERBURU,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1162

THE TIMES MIRROR COMPANY,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellant respectfully petitions for a rehearing of this Court's order affirming the decision of the United States District Court for the Central District of California.

1. This Court Should Grant Full Review in This Case Because of Its Importance to the Future Operation of the Newspaper Industry.

Both this case and the *United States v. Citizen Publishing Co.* case, which this Court will probably be asked to decide,[1] are landmark decisions which could have immense implications for the future shape of com-

[1]Appellant has been advised that the defendants in *Citizen Publishing* have filed a notice of appeal and do plan to file a Jurisdictional Statement.

petition in the newspaper industry. In view of the important role which newspapers play in a democratic society, the shape of competition in the newspaper business is a matter of paramount national concern. In his recent testimony before the Senate Judiciary Committee Subcommittee on Antitrust and Monopoly, the Assistant Attorney General for Antitrust observed that the newspaper industry is not only important because it "is larger than many if not most of the manufacturing industries in the nation's economy" and the "value of its production is greater than that of the drug industry or the meat products industry, and is roughly equivalent to that of the petroleum refining industry," but also because the newspaper business "is peculiarly touched by the public interest because it involves not only a commercial venture but also the dissemination and interchange of information and ideas."

The Assistant Attorney-General acknowledged in his testimony that the Justice Department would regard a Supreme Court decision affirming this case as a "valuable precedent" in cases involving metropolitan and suburban newspapers. Although Mr. Turner's description of the case reflects some misconceptions concerning the facts of the case and the content of the District Court opinion, his admission that this is a very important case ought to be sufficient reason for concluding that full review is warranted.

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[2]San Bernardino is *not* a suburb of Los Angeles, the Sun is not a suburban paper, and the District Court did not suggest that this merger falls within the metropolitan-suburban category. However, a proper analysis of the role of metropolitan and community newspapers could have provided some insights into the actual roles of metropolitan and suburban newspapers. Therefore, Mr. Turner's conclusion that this case could be a significant precedent is correct in spite of these misconceptions.

2. Full Review Is Required Because the Government and the District Courts Have Failed to Develop a Coherent and Consistent Concept of Newspaper Markets.

This case and the *Citizen Publishing* case could serve as effective vehicles for an examination of the economics of the industry and the development of guidelines for the application of antitrust policy to the newspaper business. These cases have thus far failed to serve that purpose because the Government and the District Courts were unable to develop a coherent and consistent concept of newspaper markets which could serve as a basis for such an examination and the development of such guidelines. They have already produced a total of four different answers to the same market question.

The Government contended at the trial in this case that all newspapers which are *sold in the same area* compete with each other (Post Trial Fact Brief for the United States, p. 20) and should, accordingly, be included in the same product market. Meanwhile, the Government contended in *Citizen Publishing* that "daily newspapers *published in Tucson* are a separate line of commerce" (Trial Brief for the United States, p. 5, emphasis added). In other words, the Government contended in *Citizen Publishing* that local newspapers are in a distinct product market while it contended in this case that local and out-of-town newspapers are part of the same product market.

The District Court in *Citizen Publishing* accepted the Government's contention in that case. It found that out-of-town newspapers do not compete with local newspapers because buyers do not regard them as substitutes. The District Court in this case concluded that

it did not have to decide whether local and out-of-town newspapers compete or not. It adopted a third theory for determining newspaper market boundaries and held that *all* daily newspapers should be included in the same product market because they are products of the same industry.

The Solicitor-General rejected all three theories in the Government's Motion to Affirm. He undoubtedly recognized that markets cannot be defined to include noncompeting products and that the District Court's reasoning is indefensible.[3] He also refrained from adopting either of the Government's trial contentions. Although the Solicitor-General expressed approval of the exclusion of the *Los Angeles Times* and the Phoenix newspapers from the Tucson market (MA p. 14) and admitted that the Government and the District Court erred in including the *New York Times* and the *Washington Post* in the San Bernardino market (MA pp. 14-15, n. 5), he nonetheless insisted that some out-of-town newspapers are substitutes for local newspapers and should be included in the local newspapers market. He suggested that some local and out-of-town newspapers possess some common quality which makes them competing products while other local and out-of-town newspapers are not competing products.[4]

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[3]Instead of defending the District Court's approach to market definition, the Government has attempted to create the impression that the District Court did not mean what it said by suggesting that the District Court really did conclude that the Times and the Sun compete for circulation and merely failed to incorporate such a finding in its lengthy opinion through oversight. An examination of the District Court's product market discussion (JS App. A 15-23) will demonstrate that the District Court's failure to decide whether the Times and the Sun compete was deliberate.

[4]Appellant did not receive the Motion to Affirm until April 15 and was, therefore, unable to file a reply brief before the

This Court's action in affirming the decision below without argument or opinion has compounded the confusion. It will be impossible for courts, lawyers, the Government or newspapers to determine which of these four inconsistent market theories the Court intended to approve. We submit that full review in both cases is required to eliminate this confusion and to develop some guidelines for the application of antitrust policy to the newspaper business.

3. The Government's Latest Theory of Newspaper Markets Is Not Meritorious.

Appellant submits that the Court should also reconsider its decision because the Government's latest theory for determining newspaper markets is not meritorious. The Solicitor-General did not attempt to identify the mysterious quality which supposedly makes the *Los Angeles Times* a substitute for the *San Bernardino Sun* even though the *Phoenix Gazette* is not a substitute for the *Tucson Daily Citizen*.

The Solicitor-General strongly suggested that relative circulation in the local area provides the clue to the presence or absence of this quality. He noted that the Tucson newspapers have a combined circulation of 73,799 in the Tucson area while the out-of-town papers have a circulation of 3,379, or 4.4% of the total, and concluded that these figures demonstrate a lack of effective competition. The *San Bernardino Sun* and *San Bernardino Telegram* have a combined circulation of 48,154 in the San Bernardino City Zone [Ex. 899] while the Times has a circulation of 3,377 in that area

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April 19 conference which would demonstrate the significance of the conflicts among the Justice Department's positions.

[Ex. 898]. Thus, the Times circulation is 6.6% of the combined circulation of these three papers and an even smaller percentage of the combined circulation of all daily newspapers sold in the area. Therefore, the number which, according to the Solicitor-General's theory, reveals that an out-of-town newspaper possesses the mysterious quality which makes it a substitute for a local newspaper must be somewhere between 4.4% and 6.6%.

The record in this case certainly does not support the Government's latest theory. The statements of a few witnesses to the effect that they believed that all newspapers which circulate in the same area compete with each other (MA p. 13) are inconsistent with the Government's latest theory.

Even though the Government had the burden of proof at trial, it failed to present any competent evidence, by cross-elasticity studies or any other means, that buyers do regard the Times and Sun as substitutes. Several San Bernardino residents testified that they did not regard the papers as substitutes [Tr. 2724, 2753, 3008] while the Government was unable to produce a single San Bernardino resident who would testify that he did regard the papers as substitutes. The Solicitor-General attempted to disguise the Government's failure to present affirmative evidence by implying that Appellant relied exclusively upon Dr. Phillips' cross-elasticity study. Dr. Phillips' studies merely confirmed the observations of expert and other witnesses.[5]

[5]The Government's suggestion that the absence of cross-elasticity may be attributable to errors in Dr. Phillips' methods is fanciful. The errors discovered in the Exhibit 808 circulation data were small [Tr. 1740-41]. The entire computer program was nonetheless rerun with the corrected data of Exhibit 808A. The tests again failed to reveal any relationships between relative

The Solicitor-General has attempted to minimize the significance of the absence of cross-elasticity by implying that this Court may have erred when it adopted cross-elasticity as the test of substitutability in *Brown Shoe*. He contended that there may be buyers who are totally insensitive to price changes, but nonetheless shift from one product to the other in response to changes in the product (MA p. 12). This is certainly an interesting theory, but there is no evidence whatsoever

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price and relative circulation changes in the two papers [Tr. 1741-42]. While some unavoidable discrepancies between the geographic area used to compute the Times' circulation data and the geographic area used to compute the Sun circulation data were admitted to remain in Exhbit 808A [Tr. 1737-38], it was Dr. Phillips' expert opinion that these discrepancies were too small to have any effect upon his conclusions [Tr. 1742]. The admission by the witness that errors in Exhibit 808 *could* (not would) result in erroneous conclusions [Tr. 1580] is an obvious fact, but one of no relevance to the ultimate conclusions drawn by the witness. The evidence in the record clearly demonstrates that there is no cross-elasticity of demand between the Times and the Sun and the opinion below indicates that the trier of fact recognized that this is the case.

Some other statements in the Motion to Affirm which convey an erroneous impression of the trial record also require comment. The quotation from Dr. Wilcox to the effect that San Bernardino residents would regard the Sun as a complete newspaper does not support the Government's contention that they would regard the Times as a substitute. The whole thrust of his testimony was that San Bernardino residents would not regard the Times as a complete newspaper for their purposes because it did not provide local news.

The reference to Otis Chandler's testimony that there is competition between the Times and the Sun is even more misleading. He only testified that there was competition in the limited sense defined by Government counsel. And, Government counsel defined competition as being simply that the two newspapers had circulation in the same area [Tr. 561].

Finally, the Government's reliance upon Mr. Pinkley's testimony is misplaced. His objectivity is open to question because of his display of unusual rancor against Appellant's management undoubtedly resulting from his discharge as publisher of the *Los Angeles Mirror* [see Tr. 1053]. His identification as a former Sun employee is misleading since he had not worked for the Sun for over forty years [Tr. 960-961].

that buyers shift from the Times to the Sun in response to changes in the contents of the papers. On the contrary, the evidence demonstrated that neither paper could change its contents to meet the needs of the other paper's readers without destroying its existing market. The record shows that every paper is, as the District Court found, a "captive of its community."

The District Court recognized that the Government failed to prove that the Times and the Sun compete for circulation. Neither the District Court's novel market theory nor the Government's newest newspaper market theory can fill that gap.[6]

It appears that the Government's Motion to Affirm must have misled the Court as to the nature of this case and the nature of the decision below. The Court should, therefore, vacate its order affirming the decision below and grant the Appellant a hearing.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
Counsel for Appellant.

ROBERT F. ERBURU,
Of Counsel.

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[6]The Solicitor-General also suggested that even if the Times and the Sun do not compete there may have been potential competition between the Times and the Sun. The Government spent a great deal of time at trial trying to develop some evidence of potential competition. The District Court's failure to discuss the question in its lengthy opinion shows that the District Court recognized that the Government had failed to prove either actual or potential competition.

The Government has also attempted to reinforce the District Court's unsubstantiated entry barrier conclusions by asserting that the conversion of the Rialto paper from an evening daily to a weekly is evidence of enhanced entry barriers while asserting that the conversion of the Victorville paper from a weekly to an evening daily is irrelevant because the District Court was only concerned with entry barriers in the morning submarket (MA p. 20). Such inconsistencies within the same paragraph provide further evidence that the Justice Department needs guidance from this Court in order to develop any coherent concept of relevant newspaper markets.

Certificate of Counsel.

I, Julian O. von Kalinowski, counsel for the above named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JULIAN O. VON KALINOWSKI,
Counsel for Appellant.

Supreme Court of the United States

October Term, 1967

No. 1162

THE TIMES MIRROR COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justice of the Supreme Court of the United States:

The Justice Department has just adopted still another theory of newspaper product markets. The Justice Department has filed a memorandum with the Federal Communications Commission urging that the Commission deny a request to transfer a license to operate a television station in Beaumont, Texas, to the publishers of two Beaumont newspapers. The memorandum contends that such a transfer will reduce competition in the relevant product market which it defines as "the broad market of mass dissemination of current news and advertising by the local mass media." (Bureau of National Affairs Antitrust & Trade Regulation Report, No. 357, pp. A-18—A-19)

product market as comprising *local* newspapers, *local* television stations, and *local* radio stations. This product market theory is inconsistent with all four of the product theories advanced by the Government or adopted by the District Courts in the *Times Mirror* and *Citizen Publishing* cases. Although these four theories differed as to which newspapers should be included, they all excluded other media from the product market.

The memorandum is particularly inconsistent with the Government's positions in this case in that it emphasizes that advertisers who wish to cover the local area must select among local media which cover the area with enough penetration to make advertisements commercially effective and persons seeking local news must select among the local media reporting local events. If the District Court in this case had adopted the Government's latest market theory, it undoubtedly would have reached a different result.

The Government's latest action provides further evidence that full review is essential to end the rapidly increasing confusion.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
Counsel for Appellant.

ROBERT F. ERBURU,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

TIMES MIRROR CO. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1162. Decided April 22, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN would note probable jurisdiction and set the case for oral argument.